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IN THE

Supreme Court of the United States

October Term, 1957

No. 968

UNITED STATES OF AMERICA,

Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,

Petitioner.

PETITION OF JOSEPH P. McCONNON FOR A WRIT OF CERTIORARI

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To the Honorable, the Justices of the Supreme Court of the United States:

Joseph P. McConnon, by his attorney, Isadore Katz, Esq., respectfully petitions the Court for a Writ of Certiorari to the Court of Appeals, Second Circuit, and in support thereof respectfully shows:

A

The Opinions of the Court Below.

The opinions of the Court of Appeals, Second Circuit, are appended hereto as Appendix A and B; they have not been officially reported.

B

The Grounds on Which the Jurisdiction of this Court is Invoked.

The judgment of conviction for conspiracy to violate the Hobbs Act, sought to be reviewed, was rendered and entered by the United States District Court for the Northern District of New York on April 17, 1956. The judgment was affirmed by the Court of Appeals, Second Circuit, on February 21, 1957. A petition for rehearing was filed on March 8, 1957 and denied on April 9, 1957. In the opinion in which rehearing was denied, the Court below stayed its mandate, pending a timely application to this Court for a Writ of Certiorari, and if such be granted, until final dispositive action by this Court; and in the meanwhile bail was continued.

Petitioner believes that this Court has jurisdiction to review the judgment by Writ of Certiorari under Title 28 U. S. C. Sec. 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928.

The grounds on which the jurisdiction of this Court is invoked are that the Court of Appeals in affirming the judgment has decided that

(1) The Hobbs Act, despite its vagueness, does not violate the Due Process clause of the Fifth Amendment to the Constitution of the United States. This is a question of federal law not yet, but which should be, settled by this Court;

(2) Under the Hobbs Act, the petitioner, himself an employer-victim of a strike, may be found guilty of conspiring with an extorting labor leader in charge of a strike because, during the strike he acted as intermediary between the labor leader and one of the struck employers, carried messages back

and forth and then, at the request of one struck employer, carried the extortion money to the labor leader. This involves a question of federal law, not yet, but which should be, decided by this Court.

(3) The Trial Court did not depart from the accepted and usual course of judicial proceedings:

(a) In denying a motion to exclude from the court room all witnesses awaiting calls to testify;

(b) In charging the jury, even though by the use of a scales-of-justice metaphor, it supplanted the rule of reasonable doubt with the preponderance of evidence rule;

(c) In refusing to charge the jury to distinguish between the intent, motive and purposes of the petitioner and the intent of the labor leader.

C

The Questions Presented for Review.

1. Is the Hobbs Act so vague and indefinite as to be void for vagueness under the Due Process Clause of the Fifth Amendment?

2. Does the conspiracy provision of the Hobbs Act apply to the petitioner, whose business as an operator of trailerships carrying trucks between Albany and New York, N. Y., was halted by a strike of the truck drivers against trucking companies in Albany, because he acted as intermediary between the struck operators and the extorting labor leader in order to bring about the end of the strike and the resumption of his business?

3. Was there proof of conspiracy?

4. Was it fair to the petitioner to try him on a charge of conspiracy to cause strikes in order to extort money from the struck employers and then convict him on the theory that he had aided and abetted the extorter?

5. Should the Trial Court have charged the jury that the petitioner could not be found guilty of conspiracy unless it was found that he entered into an agreement with the labor leader with the intent to continue the strike until the struck employers paid money under fear of force or violence or threat thereof?

6. Was it prejudicial error for the Trial Court to deny the motion to exclude from the court room all witnesses awaiting a call to testify?

7. By his use of the scales-of-justice metaphor, did the Trial Court, in his charge to the jury, substitute the rule of preponderance of evidence for the rule of reasonable doubt and was this reversible error?

D

The Statute Involved.

SECTION 1951, TITLE 18, UNITED STATES CODE

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

E

Statement of the Case.

In an indictment containing a single count of conspiracy, it was charged that from on or about June 1951 and continuing up to the time of the filing of the indictment, April 1955, Peter Postma and Nicholas Robilotto, two business agents of a local teamsters' union in Albany, New York, and Joseph P. McConnon "did conspire together * * * to

obstruct, delay and affect interstate commerce * * * by extortion"; that it was a part of said conspiracy that Postma and Robilotto would use their positions in the union to obtain $10,000 from twelve trucking companies by threatening and actually causing work stoppages until the payments were made.

No such conspiracy was proved. At the conclusion of the Government's case, the Trial Court granted a motion to acquit Robilotto. McConnon did not testify. Both Postma and McConnon were found guilty by the Jury.

The Court of Appeals said that they were found guilty of conspiring to interfere with interstate commerce by extorting money "under threat of continuing the strike" which, said the Court of Appeals, "is precisely the conspiracy charged in paragraph 1 of the indictment", though the indictment referred to a conspiracy to cause strikes.

Under cover of the indictment, the Government introduced a great mass of testimony of bitter labor negotiations between the representatives of an association of trucking companies and the local teamsters union, beginning in June 1951 when Postma, the chief union negotiator, gracelessly accepted an increase of 13¢ per hour under a wage reopening clause and said, "Next year, when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are in the street, I will jam it down your throat" (58a, 201a, 407a),* and continuing up until the advent of the strike on November 7, 1952 when negotiations for a new contract broke down.

The overwhelming mass of testimony in the case consisted of angry recitations by the employers of the course of these negotiations, the union demands for a new contract which the employers characterized as grossly exorbitant, and the surly manner in which Postma carried on the negotiations.

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* References in parenthesis are to the printed Appendix filed in the Court of Appeals and in this Court.

McConnon had not the slightest connection with any of these matters of which the employers complained so bitterly. He was himself an employer who operated Trailerships, Inc. in Albany, New York, which transported truck trailers by ship on the Hudson River (150a).

He was not connected with the teamsters' local union nor was he involved in the labor relations or negotiations between the local union and the trucking employers (180a). He solicited business from the trucking employers and maintained warm, friendly and cordial relations, both socially and commercially, before and after his alleged part in the conspiracy, with John J. Vogel, Jr., a trucking employer, the chief government witness.

The strike of the truck drivers necessarily halted the operations of Trailerships, Inc.

The only significant testimony concerning McConnon was given by John J. Vogel, Jr. On November 13, 1952, on the sixth day of the strike, McConnon, who was as much affected by the strike as the struck trucking employers, came to a table in a hotel bar and grill in Albany where Vogel and Mayberry, another trucking employer, were seated. McConnon talked for a few minutes "about why don't we get the strike settled and his Trailerships were not in operation, he was losing money, and that kind of discussion and, as I recall it, he motioned for John Vogel to go out in the hall, he would like to talk to him" (214a). Vogel went with McConnon into the hallway of the hotel where McConnon said, so Vogel testified, "If you will offer the seven points, and $10,000, that Pete will settle the strike" (74a). The seven points referred to union demands concerning wages and fringe benefits.

Vogel said nothing to McConnon but returned to the table and told Mayberry that Postma wanted the seven points and $10,000 (82a). Vogel testified that he was scared, that he was thinking of other struck operators signing "if and when" contracts to get their trucks rolling,

and that he could not stay in business very long if he had to sign the "if and when" contract (79a). Despite such fears, recited as well by the other employers, Vogel and Mayberry, and Dastoli, another trucking employer who joined them at the table, immediately wrote down the seven points in dispute, prepared a list of truckers and the amounts each might contribute toward the $10,000, and then repaired to the truckers' strike headquarters in the hotel where they discussed the matter with a number of operators who were there at the time (83a-90a). "We told them", said Vogel, "the story of what happened and they were willing to go along with it to get the strike over" (91a). Vogel then told McConnon that the operators would pay the $10,000 and McConnon left.

On the next day, McConnon told Vogel, "Nick (meaning Robilotto) then had got his oar in and they wanted $30,000 instead of ten" (92a), which the truckers refused to pay. On Saturday, according to Vogel, McConnon told Vogel that "Pete and they would then take the $10,000", and that "they wanted a small committee and get a separate room" (96a) for a meeting between three union and three employer representatives. The meeting took place that afternoon. McConnon was not present. According to Vogel, there was talk about a union convention, but no talk about the strike for several hours, when suddenly, "I walked over to one side of the room with Postma", and Postma said, " 'That this town is very small and these operators will talk' and I said nothing, and he finally said to me, 'Well, they are all getting theirs, I am going to get mine' " (102a). Vogel and Postma then returned to their seats and in a very few minutes it was agreed to settle the strike on the seven points consisting of a wage increase of 10¢ per hour and certain fringe benefits.

Immediately after the meeting, Vogel began to collect the various contributions from the other truckers. The next day, Sunday, the union membership at a meeting voted to terminate the strike and the trucks began to roll.

On the following Tuesday, without any prior discussion or arrangements, and at a time when McConnon, as was his wont, came to Vogel's office on business, Vogel gave him $7500 "and he could take it to Postma" (193a). On the following Tuesday, again without any prearrangement and at a time when McConnon dropped in to see Vogel on business, Vogel gave $2500 to McConnon for delivery to Postma, together with a list of the contributors. McConnon told Vogel that he had given the money to Postma (114a). Several months later, Postma told Vogel that he had received the $10,000.

Hickey, a Vice-President of the International Brotherhood of Teamsters, testified that about a year later McConnon came to his office in New York and told him about the strike, its effect upon the business of Trailerships, Inc. and that "he became an interested party in trying to solve or settle the strike so the Trailerships could get back in operation" (488a), that he had talked with Postma who agreed that the strike could be settled for a certain amount of money and that he got the money from Vogel and passed it on to Postma (491a).

On this testimony, the Court of Appeals held that, "McConnon intentionally and actively *allied* himself with Postma's effort to shake down the truckers;" that "each knowingly *cooperated* in an effort to *coerce* the truckers, through fear of economic consequence of a continuation of the strike, to pay Postma a sum of money for its termination"; that "the mere fact that a continuation of the strike, directly or indirectly, would work economic hardship, directly or indirectly, on McConnon, did not justify his *cooperation* with Postma in committing an illegal act" (Opinion of the Court of Appeals; emphasis supplied).

In its opinion, denying McConnon's petition for rehearing, the Court held that there was no prejudicial variance between the conspiracy charged in the indictment and the alleged conspiracy found lurking in the testimony to

support the verdict of the jury. "It is true," said the Court of Appeals, "that there was insufficient proof to hold Robilotto and as a result *the conspiracy charged was not proved to have existence until McConnon and Postma began to cooperate in a plan involving extortion*" (emphasis supplied).

Referring to petitioner's complaint that the introduction of the testimony of many bitter employers of prestrike events had prejudiced him, the Court said that, "It was admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware." This is a most curious statement for there was absolutely no testimony that McConnon "was aware" of any designs, legal or illegal, nourished by Postma against the operators. The testimony was clear that McConnon had no connection at all with any of the activities of the union or with Postma's activities which led up to the strike. He, like the struck employers, was adversely affected by the strike and, with them, entertained fears of economic loss flowing from the strike. If the crux of the case against him is that he cooperated, the evidence is clear that he cooperated in the same manner that Vogel cooperated to bring about a termination of the strike. His motion for a judgment of acquittal should have been granted.

The petitioner unsuccessfully challenged the fairness at the trial of the refusal of the Trial Court to exclude witnesses awaiting calls to testify from the courtroom while other witnesses were testifying; and made several objections to the failure of the court to charge the jury concerning McConnon's intent and generally excepted to the adequacy of the charge.

F

ARGUMENT.

POINT I

The Hobbs Act is void for vagueness under the due process clause of the Fifth Amendment to the Constitution of the United States.

Though this Court did decide in *United States* v. *Green*, ... U. S. ...., that the Hobbs Act, 18 U. S. C. Sec. 1951, was a valid exercise of legislative power under the Commerce Clause, it has not yet decided whether the Hobbs Act is sufficiently definite and clear under the Due Process clause to survive its tests. The Court below said, rejecting our argument that the Hobbs Act was void for vagueness,

> "The Supreme Court has not yet dealt with the contentions of the appellants here."

A final determination of this important question is peculiarly necessary at this time in the administration of the Act.

In the instant case, the Court below relied upon its prior decisions, particularly *United States* v. *Varlack*, 225 F. 2d 665, in which it had said that

> "The terms of the present statute are no more vague than those of its predecessor."

and cited *Nick* v. *United States*, 122 F. 2d 660, and *Campagna* v. *United States*, 146 F. 2d 524, which had dealt with the constitutionality of the predecessor Anti-Racketeering Act of 1934, the Copeland Act, 48 Stat. 979-980, 73rd Cong. 2d Sess., under the Commerce Clause. But the Hobbs Act differs in many material and significant provisions from its predecessor. Congressman Hobbs, the author of the present Act, declared, during the debates in the House,

> "The reason we left out Section 6 of the Copeland Act is the same reason we left out every word of the

> Copeland Act. We wiped the whole thing out and substituted a bill that cannot be misunderstood." (91 Cong. Rec. 11,900)

The new Act changed the title of the Copeland Act from

> "an Act to protect trade and commerce against interference, threats, *coercion* or intimidation." (emphasis supplied)

to

> "interference with commerce by threats or violence."

The word "coercion" was omitted from the definition of the crime and the gist of the crime was changed to

> "Whoever in any way or degree obstructs, delays or affects commerce * * * by * * * extortion * * *."

Whereas the Copeland Act had defined the word "wrongful", that definition was deleted from the Hobbs Act and now the word "wrongful", pregnant with a variety of meanings, stands undefined in the Act.

Furthermore, the definition of the word "extortion" was changed from

> "obtains the property of another, with his consent, induced by wrongful use of force or fear * * *."

to

> "the obtaining of property from another with his consent induced by wrongful use of *actual or threatened* force, *violence* or fear * * *." (emphasis supplied)

The word "coercion" was omitted from the Hobbs Act because of labor representations at the legislative hearings (77th Cong., Apr. and May, 1942) so as to make clear that the Act was directed at interference with the transportation of goods in interstate commerce and was not intended to impair or affect the right to strike or other rights contained in the federal labor statutes set forth in Section (c) of the Act.

The result of the changes was, we submit, to make the Hobbs Act even more obscure and more vague than its

predecessor had been. It does not contain ascertainable standards of guilt so that men of reasonable intelligence may have fair warning of the prohibited activity. It is because the words "affects commerce," "wrongful" and "fear" are so broad, indefinite and variegated in meaning that men of reasonable intelligence can only guess at their meaning in the statute. Because of the lack of precision in this criminal statute, acts thought to be beyond the scope of the federal authority under the Commerce Clause and within state police power are found to be punishable under the Hobbs Act; labor activity deemed to be protected under the federal labor statutes is presented as being wrongful, see dissenting opinion in *United States* v. *Kemble,* 198 F. 2d 880; and fear of economic loss flowing from strikes is deemed to be the kind of fear envisaged by the Hobbs Act, see *United States* v. *Varlack,* supra and cases therein cited.

Moreover, the lack of clarity in the Hobbs Act permits its extension to conspiracies to "continue strikes" as well as to "cause strikes" as in the instant case, and to reach a "shakedown" to stop a strike, even though this very activity was expressly declared to be beyond the scope of the Act. During the course of the debate on the Hobbs bill in the House, Representative Sumner asked:

> "There have been complaints that in the case of strikes, an attorney has gone in and asked an operator for something like $15,000 or $20,000, as a shakedown to stop a strike. Is there anything in the bill about that?"

Mr. Jennings, one of the Managers of the bill, replied:

> "Not a thing. This does not have a thing to do with strikes." (91 Cong. Rec. 11,912)

a. The Term "Affects Commerce" is as Broad as Congressional Power to Legislate but Does Not Describe a Prohibited Act.

The Act makes it a crime to obstruct, delay or affect commerce by extortion. We are at a loss to understand whether the word "affects" is to be read *in pari materia* with the words "obstructs" and "delays" or whether it stands separate and apart from them and means something more than interference with commerce by obstruction or delay. The term "affects commerce" is used by Congress when it wishes to bring aspects of commerce within its constitutional power and connotes the broad reach of that power. It does not, however, offer any clue as to the nature of the prohibited condition of commerce that may not be brought about by extortion without violating the Act. "Affects" means "influence" and commerce may be influenced adversely or beneficially. The Act gives no indication of whether either or both results are prohibited. One may affect commerce by obstructing it, or delaying it, or restraining it, or controlling it, or monopolizing it, or preserving it, or restoring it, or protecting it. In what sense is it used in the Hobbs Act?

Section (c) of the Hobbs Act surely uses the word "affect" in a sense different from its usage in Section (a). In what sense is it employed in Section (a)?

Because of the difficulty in ascribing a definite meaning to the term "affects commerce", the lower Court had held in *United States* v. *Varlack, supra,* that in a prosecution under the Hobbs Act it is not necessary for the prosecution to prove

> "That it was the purpose of the conspiracy to affect interstate commerce."

This, said the Court, was a matter of law and the only question open to the jury was whether the acts of the defendant constituted extortion. Thus it had become the

practice to try cases under the Hobbs Act as though the crime was the crime of extortion in interstate commerce instead of "affecting commerce by extortion".

Not only does the term "affects commerce" stand undefined in the Hobbs Act but there is no definition of it in any federal act. It is not a term of art and there are no common law precedents to give it content.

It has been difficult enough for this Court to give meaning to the term "affecting commerce" under the Commerce Clause involving the process of adjusting the interacting areas of national and state authority over commerce.

"Precisely the same kind of issues has plagued the two great English-speaking federations," said this Court in *Polish Alliance* v. *N.L.R.B.*, 322 U. S. 643; and, "There is no single concept of interstate commerce which may be applied to every federal statute regulating commerce." said the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, 495; and "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle", warned the Court in *Kirschbaum* v. *Walling*, 316 U. S. 517.

If the term is so difficult of definition when it relates to marking out the constitutional boundaries within which Congress may legislate as to plague two nations and to be equivalent to the futile attempt to square the circle, how can it be deemed sufficiently definite and certain to define a crime? Can it be said that the citizen acted at his peril because he could not in advance resolve this great and historic issue which has plagued two nations? Can it be said that a penal statute whose operation turns upon the determination of such a complex issue as the distribution of governmental power between national and state authorities is sufficiently definite and clear to survive the test of the due process clause? We believe not.

"Affecting commerce" is defined in the National Labor Relations Act, Sec. 2(7), in a most unique and singular fashion admirably tailored to the needs and purposes of that Act but wholly inappropriate to the purposes of the Hobbs Act. Despite the highly specialized definition of the term "affecting commerce" in the National Labor Relations Act, the problem of determining whether the unfair labor practices present in each case affect commerce under that Act has continuously troubled the Board and the courts. In that Act Congress made a finding and declared a policy with respect to labor disputes and their effects upon interstate commerce. No such legislative finding is present in the Hobbs Act. Consequently none of the cases decided under the National Labor Relations Act furnish any guide as to the meaning of the phrase "affects commerce" as used in the Hobbs Act. We submit, therefore, that the term "affects commerce" in the Hobbs Act are words which are vague and fluid and "may be as much a trap for the innocent as the ancient laws of Caligula", *United States* v. *Cardiff*, 344 U. S. 175, 176.

The word "affects" is surely as vague as the word "restrains" and yet it was only because of the common law meaning attributable to the word "restrains" that the Sherman Act was saved from being held void for vagueness, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

The more inclusive phrase in the Hobbs Act, "in any way or degree affects commerce", renders the term "affects commerce" even more vague and indefinite, since no citizen could be possessed of such wisdom as to know whether or not his acts would or would not in any way or degree affect commerce.

b. "Wrongful" as the Critical Word in the Definition of Extortion Has No Clear Meaning.

We noted above that the definition of the word "wrongful" contained in the Copeland Act had been deleted from the Hobbs Act. Some effect must be given to this deliberate excision by Congress of a critically important definition of probably the most crucial word in the definition of extortion in the Hobbs Act. In *Callanan* v. *United States,* 223 F. 2d 171, the Court ascribed to the word "wrongful" the same definition which had been stricken by Congress and held that despite the omission, Congress did not intend to change the meaning of the word as defined in the Copeland Act. What was easily determined by the Court in the *Callanan* case presented great difficulties to the dissenters in *United States* v. *Kemble, supra,* in which the dissenters held that the word "wrongful" is not a "term of strong art in the criminal law" and that it includes both public and private wrongs.

"Wrongful" as used in the Hobbs Act is the very essence of the definition of extortion. If this word is obscure, ambiguous or vague, it cannot be said that there is no difficulty in distinguishing the licit from the illicit and hence the statute must fall as a denial of due process.

The test to be applied is the intelligence of common men. It will not do to say that a man of common intelligence knows what "wrongful" means anymore than it is proper to say that such a man knows what the word "sacrilegious" means. "Wrongful" is surely as vague as "sacrilegious" which was explored in *Burstyn* v. *Wilson,* 343 U. S. 495 in an exhaustive search to find its meaning. To search for the meaning of the word "wrongful" must be far less rewarding than a search for the meaning of "sacrilegious" for that which is "sacrilegious" is subsumed under the more inclusive concept of the "wrongful".

The term "wrongful use" in the Hobbs Act is no more definite than the term "unjust rate". Both invite use of

moral concepts and are equally deficient under the requirements of the due process clause. See *United States* v. *Cohen Grocery Co.*, 225 U. S. 81.

The phrase "without just cause or legal excuse", a phrase commonly used in tort law, was held to be too vague in *Thornhill* v. *Alabama*, 310 U. S. 88. The words "wrongful use" are surely no more certain than the phrase "lawful occupation" at which this Court looked askance in *Lanzetta* v. *New Jersey*, 306 U. S. 451, while it struck down the statute on the ground of vagueness and ambiguity because of the use of the word "gang",—a word possessed of a variety of meanings.

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff*, *supra*.

Precisely in point is *International Longshoremen & Warehousemen Union of America* v. *Ackerman*, 82 F. Supp. 65, 104-106, in which a criminal conspiracy statute of Hawaii was held to be unduly vague because of its use of the word "wrongful".

Likewise in *United States* v. *Reese*, 92 U. S. 214, a statute penalizing the *wrongful* refusal of an election officer to receive a ballot was declared to be void for vagueness. Said the Court:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

Section (c) of the Hobbs Act compounds the difficulty. That Section reinforces the labor laws, including the National Labor Relations Act, and that Act sets forth many wrongful acts by labor unions. For example, if a union failed to send the strike notices required by Sec. 8(d) of

the National Labor Relations Act, a strike for higher wages is unlawful and the employer may discharge the strikers. Such a strike could well be deemed to be a wrongful use of threatened force or fear and in violation of the Hobbs Act. Again, a strike is unlawful under the National Labor Relations Act if its purpose is in violation of the secondary boycott provisions of that Act. Would such a strike be a wrongful use of actual or threatened fear under the Hobbs Act?

c. The Meaning of the Word "Fear" Cannot Be Ascertained from the Statute.

The word "fear" is so broad as to be another capacious net such as that condemned in the *Reese* case, *supra.* Fear of what? Unlike the New York statute, Penal Law, Section 851, which defines "fear," the Hobbs Act does not declare the kinds of fear which constitute extortion. During the course of the legislative debates it was repeatedly said by the Managers of the bill that it was intended to fashion the Hobbs Act upon the New York Extortion Statute. But the New York definitions were not included in the Hobbs Act. As a result, and despite the omission of the word "coercion", which had been contained in the Copeland Act, the courts are extending the Hobbs Act to include fear of economic loss whereas it would appear that the Hobbs Act was directed only at fear of force or violence.

This Court seems to us to have at least intimated in *United States* v. *Green, supra,* that the Act does not embrace every kind of fear but rather relates to fear of force or violence alone. This Court, in speaking of the Hobbs Act, said that it was a statute which struck at labor officials who attempt "to get personal property through threats of force or violence."

In showing the relationship between the Hobbs Act and its predecessor, this Court said,

> "The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out of state truckers by threats and violence. *The Hobbs Act was meant to stop just such conduct.*" (emphasis supplied)

We think it is significant that in footnote 7 in the *Green* case, this Court omitted reference to those cases such as *U. S.* v. *Varlack, supra; Bianchi* v. *United States,* 219 F. 2d 182, cert. den. 349 U. S. 915; *Hulahan* v. *United States,* 214 F. 2d 441, cert. den. 348 U. S. 856; *Callanan* v. *United States,* 223 F. 2d 171, cert. den. 350 U. S. 852, reh. den. 350 U. S. 926; in which cases several Courts of Appeals had held that the Act was broad enough to include fear of economic loss as well as fear of force and violence or threats of force or violence. The only case under the Hobbs Act of which this Court took notice in the *Green* case was *United States* v. *Kemble,* 198 F. 2d 889, in which the fear arose because of force and violence. We think the omission of these cases suggests that these cases in the view of this Court extended the ambit of the Hobbs Act. We refer to these cases to show that the word "fear" is too flexible for use in a criminal statute.

Since the word "fear" is so vague, broad, ambiguous and indefinite as to embrace fear of economic loss, though such fear does not seem to be included within the Hobbs Act, we respectfully submit that the use of the word "fear" in the Hobbs Act renders the Act void for vagueness.

In sum then, we submit under this Point that the Hobbs Act contains words and phrases which are so vague, indefinite and uncertain in their meaning that the statute must be stricken down as violative of the due process clause of the Fifth Amendment.

If this Court is of the opinion that the statute is not unconstitutional under the Due Process clause, then we submit that it should be so construed as to exclude fear of economic loss and be limited to fear of actual force and violence or threats thereof.

POINT II

Since the substantive crime of the Hobbs Act cannot be committed without cooperative action, there can be no indictable conspiracy under that Act between McConnon and Postma.

Assuming in this point, *arguendo* only, that McConnon did agree with Postma to affect interstate commerce by extortion, or, to state it as the Court below did in its opinion denying the petition for rehearing, that they agreed to interfere with interstate commerce by extorting money under threat of continuing a strike, we submit that such an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. There can be no conspiracy between extorter and victim under the Hobbs Act, which makes the substantive crime depend upon cooperative action, any more that there can be an indictable conspiracy between the raper and his under-age acquiescent victim. Said this Court in *Gebhardi* v. *United States*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

It is beyond dispute that McConnon was himself a victim of the strike; his business, like that of Vogel and the other operators, had been interrupted by the strike. He, like Vogel and the other operators, was under the same economic pressure to get the trucks rolling. His purposes and motives were the same as those of the truck operators. Pressure upon them was pressure upon him. The situa-

tion here is analogous to that in *United States* v. *Campagna*, 146 F. 2d 524, in which operators of cinema theatres were subjected to strikes, violence and threats, and this pressure led immediately to pressure upon the distributors of the motion pictures who were in vertical industrial relationship to the operators. There was no direct pressure, violence, threats or other interference with the employment relations of the distributors. It was the distributors who paid the extortion money in Campagna. Surely this Court would not countenance the inclusion in that conspiracy of the distributors who collected the extortion money and turned it over to the extorters! Although McConnon did not contribute a share of the money paid over, McConnon "cooperated" as the medium by which his industrial allies paid over the money just as Vogel also cooperated by collecting the allocated shares of the extortion money from the other struck employers. The government did not indict Vogel, no doubt because of the legal principle set forth in the *Gebhardi* case. It should not have indicted McConnon for he, like Vogel, could not be found guilty of conspiracy with Postma in violation of the Act because he had "cooperated" with Postma in committing an illegal act.

Moreover, during the course of the legislative debate on the Hobbs Act, Congressman Hobbs stated on the floor of the House that the definition of extortion contained in the Bill had been construed many times and "comes from the New York Code" (91 Cong. Rec. 11,900). The New York Act was never intended to embrace an employer-victim. The New York Court of Appeals so held in *Hornstein* v. *Paramount Pictures*, 292 N. Y. 467, 471-472. Since the Hobbs Act is the federal counterpart of the New York Extortion Statute, it must be concluded that the Hobbs Act like the New York Extortion Act does not include the employer-victim within its scope.

In addition, the entire thrust of the Hobbs Act was against the extorting racketeer and not against the

acquiescent employer. The course of the debates in Congress makes this abundantly plain. It was not until Section 302(a) of Labor Management Relations Act, 1947, was enacted that it was made a crime for an employer to pay money to a labor representative. If the view of the Court below is correct with respect to conspiracies in violation of the Hobbs Act, then an acquiescing employer who cooperates with a labor racketeer by paying money over to him to bring a strike to an end may be found guilty for the same activity of a violation of the Hobbs Act as well as of Section 302(a) of the Labor Management Relations Act, 1947. We submit that Congress intended no such result and that the Hobbs Act should be so construed as to exclude McConnon, an employer-victim of Postma's activity, from its scope.

POINT III

There was no proof of a conspiracy between McConnon and Postma.

The indictment alleged a conspiracy between Postma and Robilotto, the two business agents of the local union, and McConnon which originated in a statement made by Postma in June, 1951, that when the labor contract expired in 1952 he, Postma, would present a proposal to the operators that they could accept and "when you are in the street, I will jam it down your throat". At best, this was a threat to force a strike more than one year later. It cannot be deemed to be a threat to obstruct, delay or affect interstate commerce *by extortion*. Nevertheless, under the pretext that this statement in June, 1951 was the point of origin of an unlawful conspiracy, the government introduced over objection, in repetitive fashion, through a succession of bitter witnesses, a mass of highly inflammatory testimony of exacerbated contract negotiations in which the union prepared and presented excessive

demands through the dominant and domineering Postma,—all of which testimony was calculated to, and did, arouse the passionate hostility of the jury. When the government rested it was abundantly clear that Robilotto was involved in no conspiracy as charged in the indictment. He was therefore acquitted on motion by the Trial Court. There remained then only Postma, the sole "conspirator" with whom McConnon could have joined as "co-conspirator".

It is now said by the Court below that the conspiracy was not the one alleged in the indictment. At the trial, however, the government and the Trial Court tried the case on the theory that there was a pre-existent conspiracy between Postma and Robilotto in which McConnon joined after the strike began. There was no such conspiracy for McConnon to join.

The Trial Court refused to acquit McConnon on the theory that "a man becomes a conspirator or a member of a conspiracy or makes a plan which is only in one man's mind and becomes a conspiracy when he has knowledge of it and with a wilful, deliberate, affirmative act upon his part furthers it" (518a). Since McConnon did not testify or offer any testimony, the case against him stood as it did when the government rested and McConnon moved for an acquittal. At this point, it was plain, as the Court of Appeals said in its opinion denying the petition for re-hearing:

> "that there was insufficient proof to hold Robilotto and as a result, *the conspiracy charged was not proved* to have existence until McConnon and Postma began to cooperate in a plan involving extortion." (Emphasis supplied)

The search for the existence of a conspiracy led the Court of Appeals to the conclusion that the only "conspiracy" which could be found to support the judgment came into existence when McConnon and Postma began to cooperate after the strike began. Neither the govern-

ment nor the Trial Court had viewed this cooperation, as the Court of Appeals put it, to be the conspiracy set forth in the indictment. The charge to the jury did not point to this as the conspiracy of which McConnon was accused. Instead the Trial Judge instructed the jury that it could find that McConnon joined a pre-existent conspiracy. Said the Trial Judge in his charge

> "• • • an individual becomes a member of a conspiracy by his intentional participation in it or in his conscious, active cooperation in the furtherance of its purpose. It is not necessary that he be its creator or co-author but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective. (747a-748a)
>
> • • •
>
> "The government contends that in pursuance of this alleged plan or conspiracy that McConnon made or transmitted a demand, or a request, to the effect that the strike could be settled upon the giving of certain points and the payment of $10,000.00.
>
> "The government contends that Mr. McConnon with his knowledge of the existence of the plan or scheme to extort money wilfully, deliberately and knowingly allied himself with it, took an affirmative step to the consummation of the plan.
>
> • • •
>
> "The government claims that Postma, as I understand it, was a member and he allied himself within—with that scheme or plan over a period of time whereas McConnon joined at a later date." (756a)

Plainly the charge to the jury referred to a pre-existent conspiracy which the Court of Appeals now finds did not exist.

It was only after the jury returned its verdict and the case was on appeal that the government suggested that

the conspiracy consisted of the cooperation with Postma by McConnon. If this be the conspiracy relied upon to support the judgment of conviction, then, we submit, there was a grossly prejudicial variance between the indictment and the proof. But more than this, there is no evidence to support the conclusion that there was any agreement between McConnon and Postma. Without an agreement there can be no conspiracy.

Contrary to the opinion of the Court below, there was no evidence that McConnon and Postma "each knowingly cooperated in an effort to coerce the truckers". McConnon did not cooperate in any act of coercion. We note parenthetically at this point that the word "coercion" which had been contained in the Copeland Act, had been deleted from the Hobbs Act. No one testified that any act of McConnon was coercive. If the coercion consisted of the strike, it is clear that McConnon had nothing to do with it but was rather himself a victim of it.

Though the Court below sustained the conviction of McConnon it did so not because there was proof of a conspiracy but rather, as it said, because "McConnon intentionally and actively allied himself with Postma's effort to shakedown the truckers", and because of "his cooperation with Postma in committing an illegal act",—in short, because McConnon aided and abetted Postma in committing the substantive offense defined in the Hobbs Act. This cooperation might have been sufficient to sustain a conviction of McConnon as a principal with Postma had they been indicted for violation of the substantive crime; but this lately conceived theory of the case cannot serve to convict McConnon as a conspirator with Postma. One who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *United States*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

We submit, therefore, that the Court below erred in holding that McConnon was properly convicted of conspiracy upon proof that he aided and abetted Postma in committing an illegal act.

POINT IV

The Trial Court erred in failing to charge, as requested, that McConnon's guilt must be found only in his intent to join with the conspirators to affect commerce by extortion, and that his guilt cannot be made to depend upon the purposes of another.

The heart of this case, insofar as McConnon was concerned, was his intention and purpose in telling Vogel that "if you will offer the seven points and $10,000.00, that Pete will settle the strike", in transmitting the messages between Vogel and Postma, and in carrying, at Vogel's request, the money from Vogel to Postma. The testimony was clear that McConnon made no demand upon Vogel. "There was no demand", said the prosecutor (160a). "He didn't put no demand, he told me what they wanted", said Vogel (164a). Even the Trial Judge agreed that McConnon made no demand (166a).

All of the testimony placed McConnon in close and intimate relation to Vogel and the truckers, his business allies, and in opposition to Postma who, shortly after the

strike, drove McConnon out of business. It was because of the differences between McConnon and Postma in their motives and purposes and in their relationship to the parties to the strike that McConnon requested the Trial Court to charge the jury (McConnon's Requests to Charge, Nos. 16, 18, 23, 26, 27 and 31, 761a and 763a) that his guilt could be found only in his own intent and could not be made to depend upon the purposes of other people, and that in determining McConnon's intent, the jury should consider "his relations with Postma, his relations with Vogel and the other truck operators, what interest he had in causing a strike, the stake he had in the outcome of the conspiracy, the entire sequence of the events and the 'give and take' of the entire situation". These requests were refused. The Court below held in affirming the judgment that

> "Any difference in their motives or in their relationship to the parties to the strike is without significance for present purposes."

The refusal to charge as requested was, we submit, grave error (as indeed was the entire charge which instructed the jury that it could convict McConnon for joining a non-existent conspiracy and also substituted the rule of preponderance of evidence for the rule of reasonable doubt).

The differences in motivation and relationship between the parties are of vital and discriminating significance in this type of case. In a New York case of extortion, the Court of Appeals of New York stressed the very differences that the Court of Appeals deemed here to be of no significance. In *Scheppa* v. *New York*, 295 N. Y. 359, Scheppa and Calabria were indicted on two counts for obtaining money from Ambrogi by means of threats; one for conspiracy and the other for the substantive crime of extortion. At the close of the trial, the *conspiracy charge was dismissed*. Calabria was acquitted and Scheppa was convicted of extortion. The State argued that the two defend-

ants were acting together that is, that they cooperated, each with the same guilty intent. (Similarly the Court of Appeals here based its opinion on the fact that McConnon cooperated with Postma.) The facts showed that Calabria took part in the very conversation in which the threats were made; indeed he talked to Ambrogi out of Scheppa's hearing, elaborated on Scheppa's threatening statements and urged Ambrogi to make the payments demanded. (McConnon talked with Vogel but did not make any threatening statement nor did he urge Vogel to make the payment demanded.) There was no proof that Calabria, to whom the money was paid by Ambrogi, turned it over to Scheppa. (McConnon delivered the money to Postma.) Scheppa contended that if Calabria was not guilty, he could not be found guilty. The Court held that there was a vital difference between the two defendants from which the jury could find that

> "Calabria was acting, not for, or collaborator with, appellant but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve better than valor in resistance."

Though it might be said here that the jury *might* have found that McConnon was acting for, with and as collaborator of Postma, the question to be decided was whether under the testimony here, such a conclusion could fairly be reached without appraisal of the motives of McConnon and Postma and their respective relationships to the parties to the labor dispute. We respectfully urge that in the instant case, as in the *Scheppa* case, motive and relationship must be appraised even though, to be sure, the result of so doing led to affirmance in the *Scheppa* case and here leads to reversal.

Said the Court in *Scheppa*:

> "Complainant testified that he himself, at least for the time, thought that Calabria's persuasions, unlike the similar urgings of appellant, were spoken out of friendship for complainant. We think the case was

one where jurors might say, that, of the two defendants who urged complainant to part with his money lest he suffer injury, *one had, and the other did not have, a criminal intent.*

"Although both defendants in the present case came to the garage together and each expressed to complainant the same idea—that harm would befall him if he did not suffer the exaction—nevertheless it cannot be said that the evidence is identical as to the two. *Their relations to complainant were different and the jury could draw different inferences as to their motives.*" (Emphasis supplied.)

The *Scheppa* case reveals a more powerfully incriminating charge of cooperation by Calabria with Scheppa than do the facts here as they relate to McConnon and Postma. The difference in motive and relationship was deemed of vital significance in distinguishing between Calabria and Scheppa, and should be so regarded in evaluating the "cooperation" between McConnon and Postma.

If there was evidence from which the jury could have discriminated between McConnon and Postma, then the Trial Court below should have charged the jury to that effect and should not have refused to give McConnon's requested charges.

This Court had held in *United States* v. *Local 807*, 315 U. S. 521, 532-533 in referring to the defendants in that case

"The decision must be made in terms of their motivations and purposes rather than those of the others."

We submit that the refusal of the Trial Jury to make clear the differences between the intentions of Postma and those of McConnon was reversible error.

POINT V

By the use of the scales-of-justice metaphor in his charge to the jury, the Trial Court misled the jury to believe that the Government need only prove its case by a preponderance of the evidence rather than beyond a reasonable doubt.

In the course of the charge to the jury, the trial judge charged the jury on the burden of proof and reasonable doubt and the presumption of innocence. This was immediately followed by an explanation of a method whereby the jury could weigh the evidence and "determine whether or not the evidence produced by the government has established the violation". He then made use of the scales metaphor and said

> "if you determine that the total of the evidence *inclines the scales* to the contention of the Government, then you *would say*, or attach to that evidence, you *could say* it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.
>
> "If, on the other hand, in weighing the evidence the scales are evenly balanced, or they *incline* to the defendants' contention, then you would say that the Government has not borne, carried the weight of the evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole." (750a-751a) (Emphasis supplied)

Judge Frank, who heard argument as a part of the Court of Appeals and participated in the decision but died before the opinion was written, indicated in an informal conference memorandum a disposition to reverse on this point as well as upon another point discussed in our next and final point. It was his view, as it is ours, that the use of the scales metaphor indicated to the jury a modification

of the earlier instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict.

The Court below, consisting after Judge Frank's death of Clark, Chief Judge, and Hincks, Circuit Judge, said "in a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable but that in the context of the full charge given in this case, we think no fatal misunderstanding resulted." The Court of Appeals sought to show that despite the undesirability of the use of the scales metaphor and despite its lack of helpfulness, a rational analysis of the charge shows that the charge on reasonable doubt remained unimpaired. We submit, however, that it is not a question of whether a printed copy of the charge can be evaluated and analyzed to show that it "gave the impression that to convict it was necessary that the Government's evidence not only should be 'more weighty' but also that it must satisfy every reasonable doubt," but rather whether such a metaphor in a charge to a jury does not have such impact on the jury as to override general instructions of reasonable doubt. Indeed the function of the metaphor is to make clear that which might be too subtle for easy understanding and to give concreteness to the abstract and the general. The tendency of the metaphor is to supplant the general statement it was used to explain.

If, by the use of the scales metaphor, there was a misdirection which the jury might have followed, the error was prejudicial and the judgment should be reversed. We respectfully submit that the jury was misled by the metaphor and that this error was so prejudicial as to require a reversal of the judgment.

POINT VI

The Trial Court erred in denying the motion to exclude from the court room witnesses awaiting calls to testify.

At the beginning of the trial and before any testimony was taken, a motion was made that all witnesses awaiting calls to testify should be excluded from the courtroom. The basis for the motion was, as stated by counsel for one of the defendants, that there were in the courtroom a large number of individuals named in the indictment as witnesses and that their testimony would no doubt be repeated. The motion was made, said counsel, so that, "We won't have a parroting of testimony." The motion was denied, the Court stating, that he had no reason to believe that the witnesses in this case would parrot testimony any more than in any other case.

As stated in the opinion of the Court below, Judge Frank indicated an inclination to reverse because of this ruling. The Court, however, held that the ruling complained of was not erroneous on the ground that the exclusion of witnesses is a matter for the sound discretion of the Trial Court.

We respectfully submit that in this particular case the rule of exclusion invoked by the defendant should have been granted. Wigmore advocates the rule of exclusion as a right, 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955).

The circumstances surrounding this case were such that sound discretion dictated that witnesses awaiting calls should be excluded. Over three and a half years had expired between the last act of alleged conspiracy and the trial. More than four and a half years had elapsed between the first act of the alleged conspiracy and the trial. It was apparent from the nature of the indictment which comprehended matters occurring over such a long span of time that witnesses could not remain uninfluenced if they heard testimony of other witnesses of events which tran-

spired years ago. Eight government witnesses and a lawyer testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. It was quite apparent that the anticipated parroting had occurred.

The testimony concerned conversations and admissions and involved shades of meaning, innuendo and extremely illusory evidence of an emotional nature. Witnesses recited their fears when they heard of the money demand in almost similar fashion as though they were fulfilling a necessary ritualistic incantation of the requirements to secure a conviction.

We submit that if, as the Court of Appeals below held, exclusion of witnesses in a case such as this is a matter for the sound discretion of the Trial Court, and not a matter of right, discretion was abused in this case.

In further support for the application of the discretionary rule of exclusion, the Court below reinforced its views by reference to the incident involving a news story relating to a threatened government witness, implying that exclusion of witnesses might have subjected them to threats from the defendants. The record in this case contains no evidence that the defendants or any one connected with them made any attempt to approach any of the witnesses or to influence them.

The decision of the Court of Appeals implying that a denial of the motion to exclude witnesses is properly based upon the belief that witnesses will be protected thereby and justice better served is hardly compatible with the necessity of affording a fair trial to the defendants.

Wherefore, petitioner prays that this Court issue a Writ of Certiorari to the Court of Appeals of the Second Circuit to review the judgment against him in this case.

And the petitioner will ever pray, etc.

ISADORE KATZ,
Attorney for Joseph P. McConnon,
Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—October Term, 1956.

(Argued November 16, 1956 Decided February 21, 1957.)
Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

—and—

NICHOLAS ROBILOTTO,

Defendant.

Before:

CLARK, *Chief Judge,* and
FRANK * and HINCKS, *Circuit Judges.*

Appeal by two defendants from a judgment of conviction in the United States District Court for the Northern District of New York, Stephen W. Brennan, *J.*, based on a

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* Judge Frank, who participated in the decision of this appeal, died before the writing of this opinion. Although he left no draft of a dissenting opinion, he had indicated in an informal conference memorandum (1) a disposition to reverse on two points which are indicated in the body of this opinion and (2) a view that all other claims of error were without substance.

one-count indictment charging the defendants with conspiring to interfere with commerce, in violation of 18 U. S. C. A. § 1951, by extorting money from trucking companies under threat of continuing a drivers' strike. *Affirmed.*

E. Stuart Jones, Troy, N. Y. (Segal, Dorsman, Soffer & Segal, Albany, N. Y., on the brief), *for appellant Postma.*

Isadore Katz, of Lieberman, Katz & Aronson, New York, N. Y., *for appellant McConnon.*

Richard E. Bolton, Asst. U. S. Attorney, N. D. N. Y., Syracuse, N. Y. (Theodore F. Bowes, U. S. Attorney, and Andrew J. Culick, Asst. U. S. Attorney, N. D. N. Y., Syracuse, N. Y., on the brief), *for appellee.*

Hincks, *Circuit Judge*:

A one-count indictment was returned in April 1955, charging that Peter Postma, Joseph McConnon and Nicholas Robilotto, conspired from June 1951 to April 1955, when the indictment was returned, to interfere with interstate commerce by extorting money from eleven named truckers under threat of continuing a strike. The trial began in April 1956. Robilotto was acquitted by a directed verdict. The other two were found guilty and both appeal.

The Government's evidence showed that a union executive, the defendant Peter Postma, obtained $10,000 to his personal gain from a group of truck operators employing union drivers through threat of causing or continuing a drivers' strike. To carry the shakedown offer to the dealers and to collect the money demanded, Postma used as his go-between the codefendant, Joseph McConnon, manager of a firm engaged in the carriage of truck bodies by water

and hence adversely affected by any strike stopping the movement of the trucks. Because of this interest, McConnon volunteered his services as go-between. Postma availed himself of McConnon's assistance but did not originally solicit it.

The Government presented among its witnesses nine members of the Highway Transport Association of Upstate New York, Inc., which group included many of the general freight haulers in the Albany area. It was shown that in 1951 when Peter Postma bargained for his union, Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, he accepted on its behalf a 13¢ per hour increase from the Association and terminated the bargaining session with a remark that "Next year when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are out in the street, I will jam it down your throat."

In 1952, the bargaining for a new contract commenced with a demanded increase in wages and frings benefits of approximately $1 per hour; a demand which the truckers viewed as exorbitant. Bargaining continued until Friday, November 7, 1952. At a meeting on that date, the truckers offered five "points," including a 10¢ hourly wage increase, each "point" being one of the categories in the package deal demanded by the union, and offered to bargain out the remaining two points. At this stage, when the truckers thought they were close to agreement, Postma unexpectedly refused the offer in a surly manner and departed after stating that the union demanded its original wage package which included a 44¢ hourly increase. That night the strike began.

Subsequent events may best be presented by excerpts from the direct testimony of John J. Vogel, Jr., president of a trucking firm and a member of the Truckers' Association. He testified that on the following Thursday, November 13, when he and another trucker were sitting in the Ten Eyck Hotel grill, in Albany, New York, McConnon

came over to his table and said, "When are you going to get this strike over with?" Vogel replied that he did not know when the strike would end. McConnon left the table and then returned and requested Vogel to accompany him into the hallway for a private conversation. There McConnon said to Vogel, "If you will offer the seven points and ten thousand dollars, Pete [Postma] will settle the strike." Vogel's testimony continued: "When I heard that from McConnon, I was quite scared, and I was thinking about these operators signing these if and when contracts, and I was thinking that we certainly couldn't stay in business very long if we had to sign an 'if and when' contract.

By this reference to an "if and when" contract Vogel referred to those truckers who had agreed with the union, in return for their individual immunity from the strike, that they would accept the terms of the collective bargaining agreement if and when that should finally be reached. The greater the number of truckers who thus obtained immunity from the strike, the greater was the economic pressure on competing strike-bound truckers to surrender to union demands believed to be exorbitant. Surrender to these demands, it was thought, would be ruinous. Yet, because of the competitive pressure from those who had signed the "if and when" contracts, continuation of the strike would also ruin the truckers holding out. It was the fear of economic destruction or injury created by these alternatives which led the truckers to accept Postma's offer to terminate the strike upon a collective bargaining agreement calling for a modest increase in labor costs (the seven points), sweetened by a cash payment to him. That, at least, was a permissible inference from the evidence.

Vogel returned to the restaurant table where he and his colleague discussed the offer and drafted a list of truckers and the amounts each might contribute towards the needed $10,000. Then they went to the Association's strike headquarters in the hotel and discussed the offer with those truckers who were present. The truckers agreed to

accept the offer and Vogel went downstairs and so informed McConnon. On the next day, Friday, McConnon told Vogel the cash requirement had been upped to $30,000. This the truckers refused to pay. On Saturday McConnon called Vogel and they met at the hotel. According to Vogel's testimony, McConnon said that Pete and they would take the ten thousand dollars, and that they wanted a small committee and a separate room. The room was obtained and Saturday afternoon a union committee of three met with Vogel and two other truckers, where, for two and a half or three hours they discussed Postma's trip to a union convention in California. Then Vogel walked to the other side of the room with Postma who said, "This town is very small and these operators will talk." Vogel said nothing. Postma then said, "Well, they are all getting theirs. I am going to get mine." After that they joined the group and Vogel asked if the "seven points" were acceptable. These included the 10¢ wage increase and the fringe benefits offered by the truckers before the strike began which then had been summarily refused by Postma. Without discussion Postma acceded. On the next day the trucks started rolling.

Thereafter, Vogel collected various sums from various truckers and paid $10,000 to McConnon in two installments. After the first installment, McConnon returned with a $500 bill and said that Postma wanted smaller bills in its stead. Vogel could not break it and suggested trying a bank. Later, in various conversations with Vogel, McConnon told him that all the money had been delivered to Postma.

Each defendant questions the sufficiency of the evidence to support his conviction. As we held in *United States* v. *Masiello*, 2 Cir., 235 F. 2d 279, in the situation here presented, as to Postma and McConnon an absence of evidence sufficient to convict one will vitiate the conviction of the other. See also *United States* v. *Austin-Bagley Corporation*, 2 Cir., 31 F. 2d 229.

We turn first to examine the evidence as to the guilt of McConnon. He did not testify or offer any evidence:

as to him the case stands now as it did when the Government rested and McConnon moved for acquittal. See *United States* v. *Calderon*, 348 U. S. 160, footnote p. 164. At that stage, there was evidence before the jury that McConnon, as manager of Trailerships, Inc., for the first time cooperated with Postma after the strike had begun; that he did so at the behest of his employer whose business was adversely affected by the strike; and that McConnon before, during, and after the strike was on friendly terms with the truckers, who were his only customers. His claim, forcefully urged in his opening statement, throughout the trial, in summation and upon appeal is, to quote from his brief, "The evidence clearly established that McConnon did not join the alleged conspiracy but rather that he joined with the strike-bound employers, being an employer himself, to bring about a settlement of the strike by acting as the intermediary between Vogel, one of the struck employers, and Postma, the labor leader in charge of the strike." More simply, he claims that, being himself a victim of the strike, he could not and did not conspire to exploit the strike.

We do not agree. McConnon intentionally and actively allied himself with Postma's effort to shake-down the truckers. Postma was activated by hope of personal gain and perhaps a desire to bring the drivers, whom he represented, back into gainful work. McConnon was activated by a desire for the gain that would result, at least to his employer, from an end of the strike. Any difference in their motives or in their relationship to the parties to the strike is without significance for present purposes. The crucial fact is that each knowingly cooperated in an effort to coerce the truckers, through fear of the economic consequences of a continuation of the strike, to pay Postma a sum of money for its termination. There was evidence enough to establish that fact and to support the verdict of guilt which rested thereon. See *United States* v. *Brandenburgh*, 2 Cir., 146 F. 2d 878, 879. The mere fact that a

continuation of the strike directly or indirectly would work economic hardship direct or indirect, on McConnon, did not justify his cooperation with Postma in committing an illegal act. *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.*, 1 Cir., 177 F. 2d 603.

At to Postma the sufficiency of the evidence is even clearer. There was direct evidence which explicitly traced the fruits of the shakedown into his possession in addition to the proofs of his cooperation with McConnon in the conspiracy to extort. See *United States* v. *Varlack*, 2 Cir., 225 F. 2d 665, 668. As to Postma also we conclude that the conviction was sufficiently proved.

On appeal, as below, the defendants urged that the Hobbs Act is unconstitutional or that in the alternative it must be so interpreted as not to apply to cases in which the only extortion was induced not by fear of force and violence but merely by threat of economic harm. These points have been raised before and have been consistently settled adversely to the appellants. *United States* v. *Varlack*, *supra*; *United States* v. *Masiello*, 2 Cir., *supra*; *Bianchi* v. *United States*, 8 Cir., 219 F. 2d 182, cert. den. 349 U. S. 915; *United States* v. *Dale*, 7 Cir., 223 F. 2d 181, and cases cited therein. On these points we reaffirm our holdings in *Varlack* and *Masiello*. *United States* v. *Green*, 340 U. S. 415 (*sic*!), at most suggests that the Supreme Court has not yet dealt with the contentions of the appellants here.

Because twelve months lapsed between return of the indictment and commencement of the trial the appellants contend that the indictment should have been dismissed. In overruling this contention we do not rely upon the fact that neither defendant had seasonably demanded an earlier trial,* that the trial was at one stage continued two weeks at the defendants' request,** and that as to the merits the defendants were not shown to have suffered prejudice by

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* *Chinn* v. *United States*, 4 Cir., 228 F. 2d 151.

** See *United States* v. *Provoo*, 17 F. R. D. 183, aff'd 350 U. S. 857.

the delay. We deny the motion on the ground relied on below, viz., that in view of the delay resulting from defendants' motions addressed to the complaint and the pressure of judicial business on the only available judges in the Northern District, the delay was not an unreasonable one. *Compodonico* v. *United States*, 9 Cir., 222 F. 2d 310, 315, cert. den. 350 U. S. 831.

The defendant McConnon moved for a severance on the ground that otherwise he would be prejudiced by evidence as to Postma's improper conduct. The motion was denied and rightly so, we hold. Prejudice was no more likely than in other cases of conspiracy. *United States* v. *Varlack, supra; Robinson* v. *United States*, D. C. Cir., 219 F. 2d 29.

We come now to incidents in the course of the trial which are now charged to constitute reversible errors.

At the beginning of the trial, before any testimony was taken, Postma's counsel moved that all witnesses awaiting calls to testify should be excluded from the court room. After some colloquy † this motion was denied and that rul-

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† At the start of the trial, the following colloquy took place between Postma's counsel and Judge Brennan:

"Mr. Segal: I move the court that all witnesses be excluded from the courtroom aside from such witness who is to testify.

"The Court: For what reason?

"Mr. Segal: Well, in the back of the courtroom there seems to be a large number of the individuals named in the indictment. Their testimony I assume will be repeated. I feel perhaps if just one witness is in the courtroom, we won't have a parroting of testimony.

"The Court: What was that last?

"Mr. Segal: Parroting.

"The Court: We don't follow that up here in this District very much. We do in narcotic cases, and unless there is some reason for it, and I have no reason to believe that the witnesses in this case will parrot testimony any more than in any other case. This is just an ordinary case. We will try it in the ordinary way. I will deny your request."

ing is now pressed as erroneous. The trial then proceeded: the Government offered as witnesses eight executives of corporate members of the trucking Association and its lawyer, all of whom testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. Although it does not affirmatively appear that all these witnesses were in the court room and heard their predecessors testify, certainly there was no ruling to prevent such procedure and, giving the defendant the benefit of the doubt, we assume that that was just what happened.

None the less, we hold that the ruling complained of was not erroneous.* By a long and unbroken line of federal cases ** it is well established that the exclusion of witnesses is a matter for the sound discretion of the trial court. The same rule prevails, we believe, in a majority of state court jurisdictions. See, e.g., *People* v. *Cook*, 292 N. Y. 185. Although in many cases the exclusion of witnesses is obviously desirable for such effect as it may have to prevent the perjurious parroting of testimony, we think it better to leave the decision to the judge than to adopt a rigid rule requiring exclusion of all witnesses as a matter of right. Not infrequently justice may be better served, we

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* Judge Frank indicated an inclination to reverse because of this ruling.

** *Holder* v. *United States*, 150 U. S. 91; *United States* v. *Chiarella*, 2 Cir., 184 F. 2d 903, remanded on another ground 341 U. S. 946; *Bromberger* v. *United States*, 2 Cir., 128 Fed. 346; *Powell* v. *United States*, 6 Cir., 208 F. 2d 618, cert. den. 347 U. S. 961; *Kaufman* v. *United States*, 6 Cir., 163 F. 2d 404, cert. den. 333 U. S. 857; *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868, 879, mandamus den. 296 U. S. 548; *Hood* v. *United States*, 8 Cir., 23 F. 2d 472; *Witt* v. *United States*, 9 Cir., 196 F. 2d 285, cert. den. 344 U. S. 827; *Lii* v. *United States*, 9 Cir., 198 F. 2d 109; *Mitchell* v. *United States*, 10 Cir., 126 F. 2d 550, cert. den. 316 U. S. 702; *Gates* v. *United States*, 10 Cir., 122 F. 2d 571, cert. den. 314 U. S. 698; *Oliver* v. *United States*, 10 Cir., 121 F. 2d 245, cert. den. 314 U. S. 666; *Reger* v. *United States*, 10 Cir., 46 F. 2d 38.

think, by allowing witnesses to remain in the court room than by relegating them to the public corridors of the court house, where they will be exposed to the possible importunities and threats of hostile parties.* We do not overlook Wigmore's advocacy of the rule of exclusion as of right. 6 Wigmore, Evidence, Sec. 1839 [3rd Ed., Supp. 1955]. Nevertheless, we adhere to the principle underlying the discretionary rule prevailing in the federal courts. And especially in view of the subject-matter of the claim of error next to be discussed (a news story relating to a threatened Government witness) we hold that no abuse of discretion has been shown. In *Charles* v. *United States*, 9 Cir., 215 F. 2d 825, it was held that a refusal to exclude witnesses from the court room in pursuance of a settled practice was error, albeit harmless error, as involving a negation of the discretion resting on the trial judge under federal practice. In this case, we hold that no negation or abuse of discretionary power was shown even though the trial judge may not have spelled out all the considerations pertinent to his ruling.

The defendants further complain of prejudice allegedly resulting from newspaper publicity at the time of trial. Six days after the trial began, they offered articles from local newspapers, published the day before, reciting that a potential witness for the Government had stabbed himself after receiving threats. They moved for a mistrial on the ground that the implications from such stories would seriously prejudice their right to a fair trial. The articles were not received in evidence but the tenor of their content is clear from the headlines which were read into the record in the absence of the jury: "Trucking Witness Stabs Self At Albany"; "Trial Witness Okay After Self Stab-

* In his admonition to the jury at the beginning of the trial, before the motion to sequester witnesses had been made, Judge Brennan had said, "Now one other thing, in this courtroom, as in most of our upstate courthouses, the place is pretty crowded. We don't have any places for jurors, or lawyers, or witnesses, that is, no special place for them."

bing"; "Postma Case Witness Threatened Stabs Self." The trial attorney for the Government, before learning of the stabbing episode, had answered newspaper inquiries by saying that the person involved was a Government witness due to testify the following day. It was altogether clear that the publicity was not due to any misconduct on the part of the prosecuting officers. Even the defendants absolve them from blame but, claiming that prejudice was nevertheless sustained, moved for a mistrial.

Judge Brennan then examined the jurors and discovered that all but two of the regular panel and one alternative had read at least one article about the case on one of the days in question. He then inquired whether that material left any impression with the jurors as to the merits of the case. Being satisfied by their responses that none had been influenced thereby, the judge then admonished the jurors that their decisions must rest wholly on the evidence as received in the court room and said "keep your mind closed to everything outside the courtroom itself." During all of this, the subject-matter of the articles had not been mentioned in the hearing of the jury. The motion for mistrial was denied.

We think that this ruling was well within the range of discretion vested in the trial judge. *United States* v. *Allied Stevedoring Corp.*, 2 Cir., —— F. 2d ——, decided February 4, 1957; *United States* v. *Weber*, 2 Cir., 197 F. 2d 237, cert. den. with comment 344 U. S. 834; *United States* v. *Leviton*, 2 Cir., 193 F. 2d 848, cert. den. with comment 343 U. S. 946. The forceful admonition of the judge distinguishes the case here from *Briggs* v. *United States*, 6 Cir., 221 F. 2d 636, in which no admonition at all comparable had been given. And here the publication was not caused by improper action of Government officers as in *Shepherd* v. *Florida*, 341 U. S. 50, and in *Griffin* v. *United States*, 3 Cir., 295 Fed. 437.

The last claim of error which we shall discuss was raised by the defendant Postma: it was covered by an exception to a portion of the charge included in a passage

which we set forth in the margin.* The defendant argues that the use which the judge made of the scales metaphor indicated to the jury a modification of his earlier, correct, instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict. Judge Frank, in his conference memorandum took that review.

In a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable. However, in the context of the full charge given in this case we think no fatal misunderstanding resulted. To evaluate correctly this claim of error it must be borne in mind that the passage complained of immediately follows full and unexceptionable instructions as to reasonable doubt, the applicable burden of proof, and the presumption of innocence which

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* "Now, ladies and gentlemen, following that statement of those two rules, I think perhaps it would be logical if you would say to me, 'Well, how do I weigh evidence; how do I determine whether or not the evidence produced by the Government has established the violation charged in the indictment.'

"Ladies and gentlemen, there is no magical formula by which I can tell you what weight you will attach to any particular bit of evidence. But I can call your attention to several things which you may consider in determining the weight to be accorded to a particular bit of testimony, or to evidence, offered by the witnesses. What it means is evidence which to your understanding carries conviction, carries that weight to it which establishes in your mind the truth of a fact which is under discussion.

"The best way I can tell you how you actually weigh evidence is to imagine scales, and if you determine that the total of the evidence inclines the scales to the contention of the Government, then you would say, or attach to that evidence, you could say it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.

"If, on the other hand, in weighing the evidence the scales are evenly balanced, or they incline to the defendant's contention, then you would say that the Government has not borne, carried the weight of evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole."

was stated to continue "until you are satisfied in your review of the evidence that the guilt of either or both defendants have been established beyond a reasonable doubt." Against this preface we think it reasonably clear that the effect of the judge's comment on the weight of evidence and his use of the scales metaphor was to supplement, not modify, his instructions on the applicable burden of proof. This is suggested by his introductory statement that "following that statement of those two rules [i.e., reasonable doubt and presumption of innocence] * * * it would be *logical*" to discuss the weighing of evidence. The phraseology suggested that the statement of the "two rules" was complete in itself; that the task of weighing the evidence involved a different, subsidiary, concept. If the ensuing discussion were understood to contradict or modify the completed statement of the two rules, it would scarcely follow in "logical" sequence: in that event there would have been no *logic* in the prior meticulous discussion of the burden of proof and reasonable doubt. And, more important, after the introductory comment in the first paragraph in which the scales metaphor was suggested, it was said that if the evidence in favor of the Government preponderates or is "more weighty," then "it would be up to you to determine whether or not it is of the character that dispels in your mind *any reasonable doubt.*" Surely this gave the impression that to convict it was necessary that the Government's evidence not only should be "more weighty" but also that it must satisfy every reasonable doubt. In contrast with this is the next and final paragraph quoted in the margin, in which it was observed that if the scales were in balance or inclined to the defendant's contention, the Government has not "carried the weight of evidence." In this, we discern no reasonably possible implication that the Government might be found to have established its case beyond a reasonable doubt when it failed even to sustain the weight of evidence.

All other claims of error which have been pressed we think so lacking in substance as not to require discussion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—October Term, 1956.

(Petitions filed March 5 and 7, 1957

Decided April 9, 1957.)

Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

—and—

NICHOLAS ROBILOTTO,

Defendant.

Before:

CLARK, *Chief Judge,* and HINCKS, *Circuit Judge.*

ON PETITIONS FOR REHEARING

E. STUART JONES, Troy, N. Y., *for appellant Postma.*

ISADORE KATZ, New York, N. Y., *for appellant McConnon.*

PER CURIAM:

Each of the appellants, whose convictions were affirmed by our opinion reported at —— F. 2d ——, petitions for rehearing.

McConnon's Petition

It is now contended that we overlooked McConnon's claim of a fatal variance between the conspiracy charged, which was alleged to have begun on or about June, 1951, and that which the jury found to have been formed when McConnon and Postma began their collaboration in November, 1952. It is true that we did not discuss this contention in our original decision: we thought it too specious to need discussion. For the indictment charged a conspiracy between Postma, Robilotto, and McConnon "to obstruct, delay and affect interstate commerce * * * by extorting from" 12 named members of the trucking industry. It is true that there was insufficient proof to hold Robilotto and as a result the conspiracy charged was not proved to have existence until McConnon and Postma began to cooperate in a plan involving extortion. But because the indictment charged a three-man conspiracy existing between 1951 up to the date of the indictment and the proofs went no further than to show that of the three charged only two were criminally involved in a conspiracy not perfected until 1952, it does not follow that there was a fatal variance: the conspiracy proved fell within the period charged. And a conspiracy to interfere with interstate commerce by extorting money "under threat of continuing a strike" is precisely the conspiracy charged in paragraph 1 of the indictment which named McConnon, along with Postma and Robilotto, as a conspirator.

Nor may McConnon justly complain that he suffered undue prejudice from evidence relating to Postma's declarations and activities prior to the consummation of their joint conspiracy, as proved. Although that evidence was

offered primarily in an effort (which turned out to be unsuccessful) to prove the existence of a conspiracy between Postma and others before McConnon came into the scene, it was also admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware. *Heike* v. *United States*, 227 U. S. 131, 145; *United States* v. *Campagna*, 2 Cir., 146 F. 2d 524, 530, cert. den. 324 U. S. 867.

McConnon, in an effort to support sundry other attacks on the validity of his conviction, cites *Pereira* v. *United States*, 347 U. S. 1, 11; *People* v. *Scheppa*, 295 N. Y. 359, 67 N. E. 2d 581; and *Hornstein* v. *Paramount Pictures*, 292 N. Y. 468, 55 N. E. 2d 740. In view of the evidence and the charge in this case, it seems to us abundantly plain that none of the cases cited demonstrates any of the errors which McConnon thinks inherent in his conviction.

Postma's Petition

This petition raises only contentions which we think were adequately discussed and dealt with in our original opinion.

Conclusion

The petitions are both denied on the merits. However, in view of McConnon's expressed intention to apply for certiorari, our mandate as to both appellants will be stayed pending a timely application for certiorari and, if such be granted, until finally dispositive action by the Supreme Court. Meanwhile, as to each, bail may be continued.

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RICHARD E. BOLTON

No. 968

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER POSTMA, NICHOLAS ROBILOTTO and JOSEPH P. McCONNON,

Defendants,

PETER POSTMA and JOSEPH P. McCONNON,

Appellants.

BRIEF AND APPENDIX FOR APPELLEE

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER POSTMA, NICHOLAS ROBILOTTO and JOSEPH P. McCONNON,

Defendants,

PETER POSTMA and JOSEPH P. McCONNON,

Appellants.

BRIEF FOR APPELLEE

Statement of the Case

This is an appeal by Peter Postma and Joseph J. McConnon from a judgment of conviction and sentence entered against them in the United States District Court, Northern District of New York, by Hon. Stephen W. Brennan, United States District Judge.

The indictment, as originally returned by the grand jury, contained one count charging Peter Postma, Nicholas Robilotto and Joseph P. McConnon of unlawfully conspiring with others unknown, to obstruct, delay and affect interstate commerce, and the movement of a commodity in interstate commerce by extorting from eleven truck owners doing an interstate business.

The indictment (3a) charged the defendants Postma and Robilotto with using their positions as business agent for the Local 294 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor, to obtain property from haulers of general merchandise, doing business in interstate commerce, with their consent, by the use of threatened force and fear.

The indictment charges the defendants Postma and Robilotto of obtaining $10,000.00 from the truckers by threatening force and fear to cause work stoppages and actually did cause work stoppages of goods in interstate commerce until the trucking companies made the payment aforesaid.

The statute alleged to have been violated is 18 U. S. C. 1951. *Interference with Commerce by threats or violence.*

The verdict and sentence are set forth in Appellant's brief. The charge against Robilotto is not involved in this appeal.

Counter-Statement of Facts [1]

From 1936 until after the period covered by the indictment, appellant Peter Postma, was the Business Agent Local 294 of International Brotherhood of Teamsters at Albany, New York (625a).

Defendant Robilotto during the period of the indictment, was also a business agent of this Union (23a).

The Vogel Trucking Company, Albany, New York; Monarch Trucking Company, Watervliet, New York;

(1. References in parentheses are to page numbers of appellant's appendix unless otherwise indicated).

Palmer Lines, Great Barrington, Mass.; H & H Trucking Company, Hudson, New York; Dorn Transportation Company, Rensselaer, New York; Kimball Motor Dispatch, Inc., Great Barrington, Mass.; B & P. Transportation Co., Lee, Mass.; Brown's Express, Inc., Pittsfield, Mass.; Chamberland Express, Inc., Schenectady, New York; Imperial Motor Express, Rensselaer, New York; and Needes Express Company, Kingston, N. Y. were trucking companies operating in and/or around the vicinity of Albany, New York and haulers of general merchandise, goods and wares, doing business in interstate commerce (52a).

The Highway Transport Association of Upstate New York, Inc. is an organization of truck operators in the Albany, N. Y. area. This area is the same territorially as Local 294. All the trucking companies set forth above are members. While the organization has many purposes, perhaps the principal one is to appoint a committee each year to negotiate a labor contract with Local 294 (54a-55a). When negotiations were completed each member would sign separate contracts with the Union.

Trailerships Inc. transported truck trailers by ships on the Hudson River between New York City and Albany, N. Y. (150a). Defendant McConnon was in charge of the Albany operation (179a). There were business relations between the truck operators and Trailerships, Inc. (180a). On McConnon's payroll was a representative of Local 294 (587a). There were many dealings of one sort or another between McConnon and Postma (151a).

In the summer of 1951 the union and the committee of the Highway Transportation were negotiating under a wage reopening clause of the then current contract. After

much negotiation an agreement was reached calling for a wage increase of 13¢ per hour. In referring to this increase, Postma angrily stated to the operators present:

> "he would accept this 13¢, but next year when the contract expires in the fall, I will give you a contract you cannot accept and when you are out on the street I will jam it down your throat." (58a-407a).

Robilotto and McCall were present at the time of these remarks (201a).

In August, 1952, when the then current contract expired, the Union submitted to the operators a series of demands which included a wage increase of 44¢ per hour, improved vacations, pension plan and several other demands (61a). The operators stated the proposal was "ridiculous" and estimated the total demands would cost $1. per hour (408a & 130a). At that time the employers made a counter-offer involving the cost-of-living index (62a).

Intermittent negotiations were continued during the months of August, September and October. During this time, Postma exhibited to the committee for the operators, a strike sanction from the International Union (64a, 410a). The negotiations at this time resolved upon some seven separate points, of which the increase in wages was one. The employers increased their offer of a wage increase to 8¢ an hour and then to 10¢ an hour plus four of the other points (413a). When this offer was presented to defendant Postma, it was met with a flood of profanity and a refusal containing threats (413a, 206a).

During most of the month of October, negotiations were suspended but were resumed on November 6, 1952, at a meeting at which the full union negotiating committee was present (207a, 415a). Postma was the sole spokesman for

the union and Judge Rubenstein negotiated for the truckers' association (66a). It appeared at this meeting that an agreement could be reached on all points (416a). The following day the truckers' committee met and authorized Judge Rubenstein to offer the 10¢ an hour increase and all but two of the other seven points (417a). It was explained that this was merely a bargaining maneuver. On that day the union was represented by only Postma, McCall and Robilotto (68a). When Judge Rubenstein offered the five points, Postma became very indignant and refused to further discuss the matter (417a). After a nudge from Robilotto, Postma gathered his papers and walked from the room with McCall and Robilotto (209a). He was urged to stay and continue to talk but he refused to do so and when asked what this all meant, he said "You'll find out." Shortly thereafter on the same day, the strike began (419a).

The truckers set up headquarters at the Ten Eyck Hotel and met frequently in order to find ways of ending the strike.

On November 13, 1952, Mr. Vogel and Mr. Mayberry both truck operators and active in the association, were sitting in the restaurant at the Ten Eyck Hotel when McConnon came to their table (72a). He left, returned, and stated that he would like to see Mr. Vogel outside (72a). McConnon told Vogel that he had been talking with Postma and the strike would be called off if the operators would give the seven points, plus $10,000 (73a, 74a). Vogel returned from the hall to the table and stated to Mayberry: "Ed, this looks like a stick-up," and told him what McConnon had said (82a). The operators had never before been asked to pay money to a labor leader. After a few minutes, another operator, Mr. Dastoli joined

Vogel and Mayberry and was told what had happened (317a). Vogel and Mayberry took two cards from the table and drew up two lists, one of the seven points and the other of possible contributors. (Govt. Exhibits 1, 2, 85a, 87a). After some conversation they agreed to go along with the proposal and made a list of operators setting forth the contributions of each, totaling $10,000. Vogel then told McConnon that the operators would pay the $10,000 (91a).

The following day, McConnon called Vogel who was at the association's headquarters and asked him to come to the lobby of the hotel. McConnon told Vogel that the price had been increased from $10,000 to $30,000. "Nick then got his car in and they wanted thirty thousand instead of ten" (92a). Vogel assumed that "Nick" referred to defendant Robilotto (94a). Vogel returned to the headquarters and discussed the newest offer with the other members and it was rejected. Vogel thereupon returned to the lobby where McConnon was waiting for him and told him that the operators would not pay the $30,000. (95a).

On the following day, McConnon again called Vogel at the operator's headquarters and they met in the hallway of the hotel. Following is the testimony of what took place at that conversation:

> "He said that they, Pete and they would then take the $10,000., and they wanted a small committee and get a separate room, and they didn't want Judge Rubenstein in on the final negotiations and they would furnish a committee of three. * * * Well, first I told McConnon to find out whether Mayberry, myself and Mel Wood would be satisfactory, and then I

contacted Rubenstein and told him, asked him to get a room at the Ten Eyck, that we were going to meet with a committee of three from the Union and that he was to be excluded" (96a).

McConnon later reported to Vogel that the three employer representatives were acceptable and Vogel told McConnon the room number where the employees representatives would meet with the union committee. That afternoon, Postma, Robilotto and McCall met at the designated place with Vogel, Mayberry and Wood (100a). The meeting lasted three hours of which less than five minutes was devoted to the discussion of the strike settlement (101a). Postma and Robilotto talked ceaselessly about a trip to a union conference in California. Shortly before the finish of the meeting Postma beckoned Vogel over to the side of the room beyond the hearing of the others and said:

> " 'This town is very small and these operators will talk' and I said nothing. And he finally said to me 'Well they are all getting theirs. I am going to get mine.'
>
> Q. Is that the extent of the conversation?
>
> A. Yes." (102a)

Immediately after this conversation Postma said the seven points were acceptable and each side agreed to call meetings of their respective members on the next day for the approval on each side of the settlement of the strike. On Sunday, the next day, the strike was ended and the trucks began to roll.

The $10,000 was thereafter collected from the various members of the association (105a). McConnon called at Vogel's office where Vogel gave him $7500.00 to take to

Postma (106a). McConnon counted the money and it was put in an envelope. McConnon told Vogel at that time that Postma wanted a list of the ones that contributed (106a). The following day McConnon returned and brought back a $500 bill that was in an envelope and said that Postma wanted smaller bills. Vogel suggested that he go to the bank (107a). On November 25th, McConnon again came to Vogel's office, whereupon Vogel gave McConnon the remaining $2500 (109a). McConnon told Vogel that he gave the payments of the money to Postma at the Wellington and the Ten Eyck Hotels (112a, 114a).

A government witness, Mr. Hickey, Vice-President of the International Brotherhood of Teamsters, the parent body of the Local 294, testified that early in 1954 McConnon called to see him, (Hickey) at the latter's New York City office. Mr. Hickey stated in substance that McConnon told him that he had become interested in the strike because his company was losing money and that he had gone to Postma and received from Postma the offer to settle the strike for $10,000. McConnon told Hickey, and Hickey so testified, that he had passed the money on to Postma (488a).

Further evidence that Postma received the $10,000 came from the testimony of Mr. Vogel in response to a question by defense counsel:

> "No. There was a time in 1953 when I was in the Ten Eyck Hotel—in the Ten Eyck Hotel, and I walked in there and I see McConnon and Postma in an argument. I asked Postma what the trouble was, was it over the $10,000, and he said 'no' he got that, but it was over some money involving trailerships." (176a).

POINT I.

The Verdict is supported by the Evidence.

The crime described in these facts recalls a terror of former years hopefully forgotten. The Court cannot read this brief statement without realizing the effect of this act upon society, the community, and these particular victims. The crime itself is graced only by the more modern refinements of its execution. Its repulsive object has not been changed. The advocates of its prosecution might well have been moved to a justifiable vigor. Yet, it is submitted that the record discloses a presentation of fact and law that was most properly and fairly restrained in every detail. Upon such a presentation the jury returned the result of its deliberation. Its verdict of guilty having been entered, all contradictory arguments of these stated facts are now barred from the consideration of this Court. The government therefore now urges upon the Court the persuasion of these facts.

The proof that the government submitted was at all times clear and consistent. It contended that Postma had a plan to extort a sum of money from the freight operators beginning in 1951 and first evidenced by his threat that he would "ram it down your throats." In 1952 he pursued his plan throughout the negotiations, causing a strike to be called and placing the operators in a desperate situation from which there could be no refusal of his demands. It was then that McConnon presented himself upon the instruction and direction of his employer to see what he could do. At this meeting with Postma, McConnon joined the criminal object of Postma's existing design and the conspiracy between the two was born. McConnon, having then become a co-conspirator, took the necessary steps to

complete the agreement. This proof was complete at the end of the government's case and it fits perfectly within the statement of law made by the Court in ruling upon McConnon's motion for dismissal, when the Court said of McConnon in the conspiracy.

> The Court: "I think it is very plain that the evidence as it stands now indicates this, that McConnon was connected in some way with Trailerships. Now, he learned from some source, apparently up to this point not disclosed, that the strike could be settled, upon the payment, and interstate commerce began to move, upon the payment of $10,000 and the granting of seven points. Having that knowledge, that that was the objective, yes, an objective of operation, he allied himself to it and sought to advance it. He went right to the source where money might be expected to come, aided in obtaining it and transmitted the request to that source. Then he very affirmatively took the step of conveying the money, et cetera. It seems to me it could be plain that a man becomes a conspirator or a member of a conspiracy, or makes a plan which is only in one man's mind, become a conspiracy when he has knowledge of it and with a wilful, deliberate affirmative act upon his part, furthers it. It seems to me plainly that McConnon is within that." (517A, 518A)

This is also the same allegation described by the Court in the charge to the jury when the Court, beginning at page 754A outlined the contention of the government, and the same argument that counsel for the government made in his summation to the jury.

This, therefore, is no new conspiracy charge conceived by the government as an afterthought. It is exactly the

same charge set forth in the indictment, proven by the testimony, argued by government counsel, and charged by the Court.

The evidence sustaining this charge is overwhelming. The statement of Postma in the 1951 negotiations was recognized by the operators as a threat. It came after the operators had already agreed upon a 13¢ an hour wage increase that should have been most acceptable to Postma, inasmuch as a smaller amount would have been the result of the arbitration called for in the contract in the case of a failure to agree. This threat was followed up at the beginning of the negotiations in 1952 by the exorbitant and ridiculous demands set forth in the union's proposals, which included a wage increase of approximately $1.00 an hour, when the highest demand before had been 25¢ an hour. The government contended that throughout the negotiations of 1952, as consistent with his plan and evidencing it, Postma did not negotiate in good faith, did not properly represent the interests of his men; but instead, consistently sought to avoid an agreement so that a strike could be called, thus preparing the way for his extortion. This is clearly evidenced by the fact that throughout the negotiations Postma never retreated from his original demands but rather at all times kept the committee of the freight operators bargaining against themselves. When at a meeting in September the freight operators raised their offer to 10¢ an hour Postma refused in a wild, angry, and profane demonstration. At the meeting at the Ten Eyck Hotel on Friday following the election, after there had been an agreement upon the seven points, the operators attempted to negotiate in a manner allowing themselves some freedom and with the purpose of keeping Postma from again backing off and increasing his demands. Postma again refused discussion, gathered his

papers in another angry demonstration, and walked from the room. Shortly thereafter a strike was in effect.

The minutes of the local union received in evidence as Exhibit No. 7 and read into the record beginning at page 478A further corroborates the fact that Postma's activities were only to further his own criminal plans and not for the benefit of the men he represented. At a meeting of the whole body on August 17th, 1952 Postma reported back "the final offer," which was then only 2¢ an hour. A vote was taken and a strike was authorized, based upon Postma's recommendation, when he as a negotiator of long experience had to know that such an offer was merely a preliminary one. There was no other meeting held of the entire body until November 16th, 1952 when Postma reported to his men (483A) in vague terms only five points of agreement when actually the operators had agreed to seven points. It was at this meeting and upon Postma's partial submission of the points that the body of men voted to end the strike. Postma never, therefore, in accordance with regular and accepted union practices, (43a) reported to his men any of the offers received by him before the strike, which offers were on the whole seven points eventually agreed upon. This exhibit read with the uncontradicted testimony clearly proves that the strike accomplished nothing for the union men and casts the only intelligent inference that it was created by Postma for his own purpose in shaking down $10,000.

The Court must fully realize the desperate situation that existed during the week of the strike when other freight operators, and necessarily competitors, were signing "if and when contracts." Thus the operators, having come through the long and extended period of meaningless and threatening negotiations were faced with an actual

strike and their frenzy was further aggravated by the increasing loss of business to their competitors by the signing of such contracts. Indeed, on the Thursday of the strike the victims were ripe for the blow. It was on that day that McConnon first actively entered the testimony. McConnon knew Postma well and from his conversations with Vogel he also knew that the parties were at a standstill and the situation was critical for the operators. McConnon's activities then are most clearly seen from his admission to Hickey (488a). Upon instructions from his employer McConnon went to Postma to see what could be done. When told the plan to shake down the operators for $10,000 McConnon had to understand, from his experience, all of the machinations of Postma in creating the scheme. McConnon agreed to the object which was in Postma's mind since 1951 and McConnon became a conspirator. Having that knowledge and having joined in the criminal object with Postma, McConnon took the first affirmative step of carrying the demand to Vogel. From the very statement that McConnon made to Vogel in presenting the demand, this Court has sufficient proof that McConnon had entered into a criminal conspiracy. Although the negotiations, the excessive demand, and the strike itself was not criminal, the infliction of a design to obtain $10,000 by them was obviously criminal. McConnon could have no excuse. He could have no explanation. He had to know that he was doing something wrong. Having this knowledge McConnon proceeded to perform the necessary acts to perfect the object of the conspiracy. Can he seriously urge upon this Court an argument that these acts were innocent? McConnon is a man who has been associated in businesses for many years, and has had business dealings with Union representatives. He is a man well aware of the practices of business and particularly

union procedures. With this background can he deny at least the sophistication to realize that he was carrying out a criminal object? (*U. S.* v. *Masiello*, Fed (2d) (2nd Cir.) decided July 8, 1956.) How can he deny the implications of the raising of the demand from $10,000 to $30,000, and the carrying back and forth of messages and the making of arrangements for the meeting? Does this not suggest that McConnon knew that Robiletto was an accomplice or co-conspirator in the scheme? How can be avoid the guilt which attaches to his activities in transferring the $10,000, the changing of the $500 bill, the making of lists, and the statement of where and how he had delivered the money?

In the events that followed the demand on the Thursday of the strike, Postma attempted to prepare his future defense by remaining disassociated and having the co-conspirator, McConnon, take all of the guilty steps. But Postma's guilt can be seen in his very effort to avoid it. When on the Saturday during the strike a meeting had to be arranged between the operators and the union men, McConnon was sent with the instructions to arrange for this meeting with only three of the operators to be present and only three of the union men. The three operators had to be approved by Postma and their number could not include Judge Rubenstein, whose presence would have revealed to an officer of the court undeniable evidence of the criminal act in progress. Through McConnon the operators were told that they should reserve a separate room from their strike headquarters for such a meeting. In compliance wtih these demands the operators asked Judge Rubenstein to reserve a room and this was done in his name. The three Postma-approved operators, Vogel, Mayberry and Wood, entered this room at the appointed time and awaited the union representatives. Shortly thereafter, Postma, again accompanied by only McCall and

Robiletto, entered the room. How could Postma have knowledge of the correct room number had he not talked to McConnon?

This Saturday meeting was itself so strange and unusual that it arouses marked suspicion. In an atmosphere contrastingly calm to that which surrounded the negotiations before the strike, three hours were spent storytelling of the trip to the Coast to the union convention by the three union representatives. It was at the ending of this lengthy incantation that Vogel took Postma into a corner and asked what was going to be done, wondering, if indeed, the strike was to be settled. Postma then replied "This is a small town and there are those who will talk, the others are getting theirs and I am going to get mine." The contrasting atmosphere of this meeting shows the connection of McConnon's messages. Postma's admission is direct evidence of the intention that had been in his mind since 1951 and the part that he was playing in the conspiracy.

The proof against Postma was most conclusive at this point. His faintest plea of innocence is shattered by the admission to Vogel when questioned as to whether an argument with McConnon was about the $10,000 and Postma said "No, I got that all right."

The record, therefore, shows that not only was the crime proven in every detail by the testimony of the victims but substantiated by independent proof and by the admissions of the two conspirators. It is not a complicated conspiracy. It was presented to the jury carefully and clearly by the submission of the proof and the charge of the Court. Each of the participants acted knowingly and intentionally. McConnon agreed to Postma's plan and

joined the conspiracy upon his own volition, not at the instigation of the operators and not because of any threat or similar inducement by Postma. This is a crime not to be lightly considered. From the proof submitted and the charge of the Court, a jury could come to no other conclusion than the positive guilt of both defendants.

POINT II.

In the case of the defendant McConnon the evidence was sufficient.

A. To support the conviction in establishing he joined in the conspiracy in all its aspects and results.

B. To establish the conspiracy alleged in the indictment.

C. To establish the conspiracy and no inflamatory evidence prejudiced him. The Judge properly charged the Jury.

The first three points raised by the defendant McConnon and most of his fifth point do not lend themselves to a separate discussion. Quite simply he is urging that since he was interested in the resumption of interstate commerce he could have no intention of delaying or obstructing it; that since his interests were the same as the victims, he could have no necessary stake in the object of the conspiracy; and that no conspiracy between Postma and McConnon was proven by the government. McConnon's position here upon appeal is no different from the one taken throughout the trial; both in his arguments to the Court and to the jury. At all times he questioned his intent to delay, affect or obstruct interstate commerce, when

his whole desire was to affect its continuance. He repeatedly urged that he was not a friend of Postma but a friend of the operators. Both of these facts can be true and yet lend no merit to his position, because his argument is based upon a false premise. The valuable object of all the conspiracies contemplated and made criminal in Section 1951, Title 18, insofar as the defendants initiating them are concerned, is the obtaining of money or other consideration, personally valuable to themselves, by the actual or threatened obstruction or interference with interstate commerce. A study of the facts of this case shows that the object here is no different. Certainly Postma was not interested in permanently interrupting interstate commerce.

U. S. vs. *Varlack,* 225 Fed (2d) 665;

Bianchi v. *U. S.,* 219 Fed (2d) 182;

Hulahan v. *U. S.,* 214 Fed (2d) 441;

U. S. vs. *Campagna,* 146 Fed (2d) 524;

Nick v. *U. S.,* 122 Fed (2d) 660;

U. S. v. *Masiello,* Fed (2d) (2nd Cir.) decided July 8, 1956).

He was interested in obtaining $10,000.00. In all of the cases the interference with interstate commerce is a means to an end.

The defendant McConnon, in his brief, terms a conspiracy to injure himself a "bizarre theory." He demonstrates his misunderstanding of the nature of the offense he conspired to commit. The strike itself was not illegal and the commerce could only be hurt so long as the strike continued. But the basic element of the conspiracy was the agreement to extort $10,000 from the operators and it

was the extortion that burdened interstate commerce, not the strike. Instead of being injured by the conspiracy, McConnon actually benefited by it, as he made no contribution to the fund, and the payment of the money by the other operators enabled him to resume his business. When it is understood that the extortion was the burden upon commerce, then that part of the appellant's argument that there was no agreement upon his part to "jam a contract down the operators' throat" seems to be specious. The same is true of his claim that there was "no evidence of an intention by McConnon to obstruct his own commerce or to put his friends and allies in fear". The operators were already in fear of injury to their business by the strike, but as the strike was legal there was nothing "wrongful" in the use of such fear to accomplish the legitimate end of the strike. When, however, McConnon agreed with Postma to get him $10,000 to settle the strike, then the use of fear became wrongful. It was not necessary for McConnon to instill fear into the operators, that was the part that Postma had already played. McConnon may not have shared in any part of the $10,000, yet, he had received from his acts a very important benefit. "An extortion" as defined in the statute "in no way depends upon having a direct benefit conferred upon the person who obtained the property." *U. S.* vs. *Greene*, 350 U. S. 420.

McConnon joined with Postma in a conspiracy to extort which burdened interstate commerce, the result of which was of definite interest and benefit to him and which conspiracy was formed well within the time set in statute of limitation.

U. S. v. *Perlstein*, 126 Fed. 2d, 879, cert. den. 316 U. S. 678.

McConnon attempted to argue throughout the trial that the only conspiracy he could have joined was one with the operators to bribe a union official. He now argues in the same vein and adds that there could be no other conspiracy proven. This contention falls in the face of the fact that he went upon the instructions of his employer directly to Postma and was not sent by the operators. This argument of McConnon's, still being presented to this Court, is the same one which appeared in the opening statement of his counsel when he described a situation totally different from the facts proven.

(Appendix to Appellee's Brief)

"Who was McConnon How did he come on the scene at all? I say to you that Mr. Vogel brought Mr. McConnon in, to carry the money that Vogel obtained. This was a bribe that was being passed through an intermediary, and we have had long relations with Mr. Vogel who helps us out in business and we have been victimized by Mr. Postma, too, and we stand here charged with extortion . . .

"We were asked by Mr. Vogel to go to Mr. Postma and ask whether he will meet in small committees so that they can heal the rift that developed between them and Postma and Vogel are old friends . . . And McConnon tells Postma what the room number is and that is all he knows about it. And he never mentioned a single word about Robiletto. He doesn't even know the man. He met him once at the bar where all these people were gathered, and was introduced to him and that is all he knows of him. He knows of no $30,000; he never mentioned $10,000; he never mentioned one cent and the next thing he knows after the meeting Vogel calls him and says 'come up and have a drink with us', so he goes up to the truckers, not to the union

people and he says 'what happened' and he says 'I think the matter is settled and Peter Postma is to bring it to a vote tomorrow morning', and tomorrow morning evidently was a vote and the employers' terms were accepted and the following Tuesday Vogel called McConnon and said 'come to my office' . . .

"That is the case. There is no conspiracy involved there. We are a messenger for the bribing employer in this case."

There was not one word of evidence submitted to substantiate the statement by counsel in this opening. On the contrary, the evidence contradicted it, as seen by the testimony of Vogel and McConnon's admission to Hickey. It is not unfair to assume that if counsel chose to make such allegations in his opening statement to the jury he should have been prepared to substantiate them by evidence.

"Besides, it is only fair to say that an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it. It is not, we think, a response to this criticism to say that he expected to prove the point stated to the jury by witnesses introduced by other defendants. His statement, in several particulars, was susceptible to verification only by his client."

Lewis v. U. S. 11 Fed (2d) 745, 747.

If such an opening without substantiation were delivered by the prosecution, it might well be cited as reversible error. Certainly the defense owes some obligation to the court and jury even in a criminal case. This discrepancy, however, is not presented here for the purpose of invoking any criticism of defense counsel; it is rather to show that McConnon's defense had its fair share of fluctuations which the jury could rightly consider.

The charge delivered by the Court was unscrupulously fair and in fact was just as the Judge stated in the argument on the request to charge, (769a) "to tell you the truth, I think I gave the defendant the best of it all." The charge was proper and sound in every detail, consistent with the volumes of decisions on the law of conspiracy and completely consistent with the prosecution's presentation. (747d)

The Court:

. . . "A person may be guilty of the crime of conspiracy even though he had nothing to do with the formation of the plan and even though he did not know of such a scheme until long after its inception; he may be guilty of the crime even though he did not know all of the details of the plan or the operation thereof; and even though he did not know all of the details of the plan or the operation thereof; and even though he did not know all of the parties connected therewith. It is sufficient if the evidence establishes that he, knowing that such a plan or scheme or arrangement was in existence, if he thereafter did anything designed or intended to help effectuate or carry on the purposes thereof.

"Putting it in other words, because the argument has been used here, in the course of this trial, as to a person joining a conspiracy, putting it in these words, an individual becomes a member of a conspiracy by his intentional participation in it, or in his conscious, active cooperation, in the furtherance of its purpose. It is not necessary that he be its creator, or co-author, but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership, but it is his knowledge of

a wilful scheme or plan, and the intentional participation in it, in the furtherance of its objection."

McConnon in his brief, seeks to avoid the recognition that a conspiracy is proven. Conceding its existence, for purposes of argument, he contends that the admission of proof of Postma's acts and declarations before McConnon joined the conspiracy was prejudicial to him. It is submitted that the charge of the court was most direct and clear in this regard.

The Court: Page 753A

. . . "And I want to make this entirely clear to you, that the statements or acts of a person charged with a conspiracy are not admissible and are not to be taken against anyone else unless or until you are satisfied with the rules that I have laid down that an agreement, a conspiracy, in fact existed."

McConnon seeks to maintain, that there is a necessity for his joining more than one conspirator in order to establish his guilt. He is attempting at this juncture to take advantage of the fact that the admissible evidence in this case was insufficient to permit the prosecution against the defendant Robiletto to continue past the government's case.

In this regard it is well to consider the decision in May v. United States, 175 F. 2d 1005. There the Court commented upon the evidence of acts of one Freeman who was indicted as a co-conspirator but against whom the Court directed an acquittal. When the Court ruled that it was not error to fail to strike the evidence as to Freeman, it was faced with a situation far more acute than the one presented in this case as here there was little evidence of the acts and declarations of Robiletto.

See also U. S. v. Campagna, 146 Fed (2d) 529.

McConnon cites many cases which hold that it takes at least two people to make a conspiracy. There is no question about that. But, in this case, there were two people, McConnon and Postma. It is certainly logical from the evidence to assume that McConnon believed that there were other members of the conspiracy. Certainly when he talked to Vogel on Friday and stated that "Nick has his oar in and it is now $30,000", McConnon believed that there was another conspirator besides Postma. His admissions to Hickey, previously quoted, show that he believed Postma not to be alone. When he made the initial demand he said "they will settle the strike." Were these the conspirators known to McConnon but "to the grand jury unknown?"

"Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted with persons whose names are unknown." Rogers vs. U. S., 340 U. S. 367, 375. See also U. S. v. Fox 130 Fed (2d) 56; Prichard v. U. S. 181 Fed. (2d) 326.

"The fact that under an indictment charging conspiracy only the appealing defendant was convicted is not a fatal inconsistency . . . Moreover, consistency in verdicts is not required." Bryan v. U. S. 120 Fed (2d) 843. See also Dunn v. U. S. 284 U. S. 390. Steckler v. U. S. 2nd Circuit, 7 Fed (2d) 59; West v. U. S. 161 Fed (2d) 452.

"The acquittal of some defendants on a conspiracy charge does not vitiate the conviction of others, where it is shown that a criminal conspiracy did in fact exist." U. S. v. Monroe 164 Fed (2d) 471; 474. See also Joyce v. U. S. 153 Fed (2d) 364, cert. den. 328 U. S. 86.

Here, therefore, is a defendant who, from the testimony, gave every evidence of his belief that others besides Postma were involved in the conspiracy, arguing to this Court that the conviction must be set aside because the proof was not sufficient to convict two besides himself. This is the defendant who requested a charge No. 33 "You may find McConnon not guilty and at the same time find Postma guilty of the conspiracy charged in this indictment." U. S. v. Miller 24 Fed. (2d) 353.

The Court charged consistently with this request

> "The defendants are not in a position to object to instructions given at their request." Bianchi v. U. S. 219 Fed (2d) 182.

According to this contention, now raised by the defendant McConnon, such a charge could not be possible. Nor did the charge direct the jury that it had to find that a conspiracy of two others existed before McConnon could criminally join in it. The defendant McConnon took no exception to the instructions of the Court in this regard. Can he now on appeal be heard in complaint of it? "Since no exception was taken to the instruction we will not consider the alleged error, unless substantial prejudice has resulted." Federal Rules of Criminal Procedure, Rule 30, 52-A, 52-B. Palmer v. Hoffman, 318 U. S. 109, 119; Johnson v. U. S. 318 U. S. 189, 200; U. S. v. Monroe, 164 Fed (2d) 471, 474.

The defendant McConnon continues to argue, in Point III, that some conspiracy might have occurred to bribe a labor official. This is consistent, with the remarks that he made in his opening to the jury. This was completely disproved by the evidence, as McConnon was not sent by the truckers, was not procured by them, but rather entered

the conspiracy by going directly to Postma at his own instance. "Manifestly, the crime of extortion can be committed without committing the crime of bribery." Bianchi v. U. S. 219 Fed (2d) 182.

Here the jury had more than sufficient evidence to justify its verdict, to reasonably conclude that there was "joint or integrated action" between McConnon and Postma. U. S. v. Masiello id. The question was most properly put to the jury in the charge of the Court; and by its verdict, the jury found McConnon "knowingly associated in an unlawful enterprise". U. S. v. Koch, 113 Fed (2d) 982; that he was in criminal concert; U. S. v. Teoni, 100 Fed (2d) 401, 403; that he had "a stake in the success of the venture", U. S. v. D. Rhee, 159 Fed (2d) 818; that there was "proof" of an agreement. U. S. vs. Tereira, 347 U .S. 1; and that there was a "common design, that is the essence of the crime." U. S. vs. Schneiderman, 106 Fed. Sup. 892. The concerted purpose or agreement was to burden interstate commerce with the extortion. McConnon, without question, entered into this common purpose with Postma and carried it forth to its completion by his many overt acts.

The citations by the appellant at page 25 of his brief of the Supreme Court's opinion in Local 807 case, 315 U. S. 521, 532, is not pertinent to the situation that existed in the present case. In the Local 807 case the problem was whether money had been extorted for protection or was paid for wages. In the present case, there can be no question of the purpose for which the money was given to McConnon; there can be no question of the "state of mind" of the truck owners. It was McConnon's intention to obtain $10,000 for Postma and he knew that to obtain the money Postma would keep the operators in a state of fear.

POINT III.

The Court did not err in failing to grant McConnon's motion for a severance.

The joining of defendants is permitted by Rule 8b of the Rules of Criminal Procedure. The very nature of the charge of conspiracy requires that defendants, alleged to have conspired together, be joined. The Court did not abuse its discretion in denying the motion.

U. S. v. *Cohen*, 145 F. (2) 82; cert. denied 323 U. S. 799.

U. S. v. *Lotsch*, 102 F. (2d) 35; cert. denied 307 U. S. 622.

POINT IV.

The Court did not err in its Charge with respect to the elements of the crime charged in the Indictment.

This point raised in the defendant McConnon's brief under Point V is treated generally in this brief under Point II.

While counsel for defendant quotes excerpts from the judge's charge, it is submitted that the charge read as a whole is meticulously correct and eminently fair to the defendant (748a). On this point, the Court said:

> "Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective."

Again, the Court stated (756a): "The Government contends that Mr. McConnon, with his knowledge of the existence of the plan or scheme to extort money, wilfully, deliberately, and knowingly allied himself with it, took an affirmative step to the consummation of that plan."

POINT V.

The Hobbs Act is not unconstitutional, and it is applicable to the facts in this case.

The defendant McConnon, in his brief, has stated that he is "painfully aware of the decision of this Court in *U. S.* v. *Varlack*, 225 F. (2d) 665. In this argument, the appellant seems to think that because the Supreme Court, in the case of *U. S.* v. *Greene*, 350 U. S. 415, based its decision on the use of actual threats or violence and did not cite the Varlack, or the Bianchi, Hoolihan, or Callahan cases, but cited only the Kemble case, it must be inferred that the Court did not deem fear of economic laws to be within the definition of extortion. He also states that the denial of certiorari in those cases did not mean that the Court agreed with the Circuit Courts in those decisions. There is nothing in this devious reasoning which should persuade this Circuit to reverse itself. The facts of this case place it squarely within the rulings of this Court as not only stated in the cases cited, but more recently in the Masiello case.

The brief of the defendant McConnon complains that the word "wrongful" has "no meaning sufficiently clear enough, or unambiguous enough, to warn a citizen that he might be in violation of the Hobbs Act." This point is amply discussed in the Bianchi case, and see also the

Varlack case at page 669. The case cited by the appellant (International Longshoremen's and Warehousemen's Union v. Ackerman, 82 Fed. Supp. 65, construed the word wrongfully as used in the Hawaii conspiracy statute, which has no bearing or influence on this Court. The rule in this regard, as set forth in the cases cited, is conclusive.

POINT VI.

The verdict against Postma is supported by the evidence.

The contentions of the defendant Postma set forth in Points I and II of his brief are based primarily upon a re-argument of the facts. The jury's verdict of guilty has, for the purpose of this appeal, removed from the consideration of this Court all questions of the credibility of witnesses and the weight of the evidence. The verdict must be sustained if there is substantial evidence taking the view most favorable to the Government and giving the Government the benefit of all inferences which can be drawn from the evidence.

U. S. v. *Manton,* 107 Fed. 834 ,839.

Hulahan v. *U. S.,* 214 Fed. 441.

Bianchi v. *U. S.,* 219 Fed. 182, 186.

U. S. v. *Hood Brown,* 2 Cir. decided July 31, 1956.

A thorough discussion of the evidence will be found in Point I of the Government's brief, and any further discussion here would be repetitious.

Postma attempts to raise the issue that Section 1951 of Title 18 was intended to apply only to professional

gangsters and cites *Kemble* v. *U. S.*, 198 Fed. (2d) 885, cert. den. 344 U. S. 893. In this case, and in all other cases on this statute which have been cited before, the defendant was a labor union official. His argument that the payment in this case was a bribe punishable under Section 186 of Title 29, U. S. C., is without merit in the face of the facts, and of the law as set down in these cases. Postma's contentions contained in Point II of his brief are based on the false premise that all of the evidence was circumstantial. This, of course, is far from the truth. However, his contentions also fall in law.

See *Holland* v. *U. S.*, 348 U. S. 121, 139.

The Court charged as follows, with reference to circumstantial evidence:

> "It most always happens that the crime of conspiracy has to be proven, if proven at all, by circumstantial evidence. The very nature of the offense explains why this is so. People who connive together for an unlawful purpose do not usually talk of their plans where they will be overheard, nor do they make their arrangements in the open" (747a).

POINT VII.

The Trial Judge did not abuse his discretion in denying Defendant's motion for a mistrial on the ground of prejudicial newspaper articles.

Motions for a mistrial are directed to the discretion of the trial court.

> *U. S.* v. *Flynn*, 2 Cir. 216 Fed (2d) 354, cert. denied, 348 U. S. 909 rehearing denied, 348 U. S. 956.

Following the publication of the articles which the defendant claims to be prejudicial, the Court (342a) read the articles, and heard the argument of counsel. There was and is no showing that counsel for the Government made any prejudicial remarks to the press and this distinguishes most of the cases cited by the defendant. The alleged prejudicial features of the articles came from the statement to the press of the landlady who was not a witness. All that Government counsel said to the press when questioned was that Mr. Davenport was a subpoenaed witness.

Counsel for the defendants requested the Court (350a) to inquire of the jury if "they have read this article and if, having read it, they will be prejudiced thereby."

The Court complied with this request (353a-354a), and satisfied itself that no prejudice existed. The implication in the *Briggs* case cited by the defendant is that the circumstances may well raise the presumption of prejudice, which should be met by an inquiry even if the defendant does not request it. The presumption here has been met,

the jury was most properly cautioned, and the denial of the motion for a mistrial was not an abuse of discretion.

See *Rowley* v. *U. S.*, 185 Fed (2d) 523.

Reining v. *U. S.*, 167 Fed (2d) 362, 365.

The Court had a right to assume in this regard that it was dealing with an intelligent American jury of honesty and integrity.

U. S. v. *Griffin*, 176 Fed (2d) 727, 731.

U. S. v. *Stocker*, 100 Fed Supp. 143; 196 Fed (2d) 276.

POINT VIII.

There was no error in denying the defendant Postma's motion for a mistrial because of Counsel's remarks upon summation.

The statements of defendant McConnon's attorney and the Assistant United States Attorney complained of under this point of defendant Postma's brief were neither inflammatory nor prejudicial, but proper and fair comments on the evidence. Defendant McConnon's counsel's statement "Do you believe it is reasonable to believe that McConnon would enter into a conspiracy with a man from whom he had to pay off" was immediately objected to by Postma's counsel. The Court, instructing the jury, said:

> "Counsel's arguments must be limited to the evidence and the inferences to be drawn therefrom. The jury will remember the evidence. If there is any question about it they can obtain what it is. Counsel must confine himself to the evidence and the infer-

ences drawn therefrom—I do not recall any evidence of Postma paying McConnon—or McConnon paying Postma—please keep to the evidence."

It would appear that there was no error in the counsel's remarks nor in the judge's ruling. Mr. Gibbs' testimony (586a-590) would support the inferences made by counsel.

U. S. v. *White*, 223 F. (2d) 674, cert. den. 350 U. S. 888.

U. S. v. *Holt*, 108 F. (2d) 365.

POINT IX.

Failure to Prosecute

The discretion of the Court was properly exercised in denying defendant Postma's motion to dismiss the indictment for failure to prosecute.

The defendant was brought to trial within eleven months after the indictment was returned. At no time was he incarcerated and at no time did he demand a trial. In fact when the case was called for trial, he asked for a delay (14a-15a).

The case cited by appellant, *United States* v. *Provoo* (D. Md), 17 F. R. D. 183, affirmed 350 U. S. 857, covers this point very thoroughly and does not support the appellant's contention. In this case it was held that: "The right to a speedy trial may be waived and is waived unless it is demanded by the accused." To the same effect: *Compodonico* v. *U. S.*, 222 F 2d, 310, cert. den. 350 U. S. 831; *Chinn* v. *U. S.*, 228 F 2d 151.

In any event there was no delay in bringing this defendant to trial.

CONCLUSION

It is respectfully submitted that the Judgment of the Court should be affirmed in all respects.

The defendants have sought in their briefs to dissest the case. It is not to be dismembered and viewed in separate parts, but only as a whole.

U. S. v. *Patten,* 226 U. S. 525.

Viewed as a whole, the evidence conclusively proved the guilt of the two defendants. "The charge was unscrupulously fair, and in all respects accurate; and the defendants had a fair trial." *U. S.* v. *Varlack,* supra.

Respectfully submitted,

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RICHARD E. BOLTON and
ANDREW J. CULICK, Asst.
U. S. Attorneys,
Of Counsel.

APPENDIX

Opening Statement for Defendant McConnon

Mr. Katz: If Your Honor please, ladies and gentlemen of the Jury:

We find ourselves in a rather strange position. Though we have been probably the leading force, the leading spirit to bring home to the Government what has happened in this case, though we are the ones that pointed out that we were the emissary to bring the money to Postmas, we find ourselves indicted. Now, what are we indicted for? We are indicted for a conspiracy with Postma and Robilotto, with whom we have no relations with respect to this strike in 1951 or 1952, or with the strike at all. We are indicted for entering into a conspiracy with these two union leaders to call a strike in order to secure money.

Now, I say to you that that is not what happened. And I propose to give you a full and complete statement of what happened. I should like you to bear in mind that the only thing before you here is an unlawful agreement, an unlawful agreement to stop merchandise in order to get ten thousand dollars.

Who was McConnon? How did he come on the scene at all? I say to you that Mr. Vogel brought Mr. McConnon in, to carry the money that Vogel was paying. This was a bribe that was being passed through an intermediary, and we have had long relations with Mr. Vogel who helps us out in business, and we have been victimized by Mr. Postma too, and we stand here charged with extortion. Maybe people shouldn't try to help their friends. That doesn't make him guilty of this very serious crime, and that is all there is to the case, as we see it.

We were asked by Mr. Vogel to go to Peter Postma and ask him whether he will meet in small committee so they can heal the rift that developed between them. And Postma and Vogel are old friends. This is not a new stiuation between them. And we went over to Peter Postma and said to him, "Will you meet in a small committee?" And he said, "Who are they?" He said, "I don't know." So he said, "Find out from Vogel who they are." And he goes back to Vogel and Vogel says "It will be myself, it will be a Mr. Maybury; it will be a Mr. Wood."

So back goes McConnon to Mr. Postma and he says, "Maybury, Wood and Vogel." And Postma says, "Okay, I will meet them. Tell them to get a room." And he gets a room. And McConnon tells Postma what the room number is, and that is all he knows about it. And he never mentioned a single word about Robilotto. He doesn't even know the man. He met him once at the bar at the hotel where all these people were gathered, was introduced to him, and that is all he knows of him. He knows of no thirty thousand dollars; he never mentioned ten thousand dollars; he never mentioned one cent. And the next thing he knows, after the meeting Vogel calls him and says, "Come up and have a drink with us." So he goes up to the truckers, not to the union people, and he says, "What happened?" He said, "I think the matter is settled. Peter Postma is to bring it to a vote tomorrow morning." And tomorrow morning apparently was a vote and the employers' terms were accepted, and then the following Tuesday Vogel calls Mr. McConnon and says, "Come to my office."

And it is not unusual for McConnon to be called by Vogel, or for Vogel to call McConnon, McConnon to call

Vogel, and we will develop that relationship between those two gentlemen. And he asks him, "Will you take this package to Peter?" And he says, "What is in the package? Is there money in the package? Seal it." And he seals it and he gives it to McConnon, drives him to the hotel, having made arrangements to meet Postma. He meets Postma and gives him the package. And a few days later this same thing is repeated, and he gives him another package, but on behalf of Vogel. Because that is the man we are helping out here. At his request. And that actually is the story.

Then we told this story to the Government. We told it to the F. B. I.; we told it to the International Union; we told it to the Grand Jury, and then Mr. Vogel comes down and asks us, "Will we change our story a little bit." And we said, "No. That is not the way it happened, John."

And John wanted to angle a little bit, so it shouldn't look like he was bribing Postma. And the other people asked him to change his story, and he said, "I won't change my story. That is what happened, and I will testify that way before the Jury."

Now, that is the case. There is no conspiracy involved there. We are a messenger for the bribing employer in this case. And we delivered the money that we received from the employer in a package to Mr. Postma.

Now, this is a very serious charge. The charge of obstructing commerce by means of extortion has some very confusing elements, because extortion is not racketeering. Let's make no mistake about that. An extortion is not a

shakedown either. Let's make no mistake about that. That is a very subtle crime and cannot be misused, and it is being misused in this case.

And I say to you watch this testimony very careful and see if you can find the conspiracy between Postma and Robilotto to call a strike, to prolong a strike in order to get ten thousand dollars.

We were very anxious to get that strike settled so our trailerships would move. Just like the other employers. And that is our case.

The Court: We will take a short recess before we start taking evidence.

No. 968

FILED
MAY 3 1957
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

No. 48—October Term, 1956

Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

v.

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

and

NICHOLAS ROBILOTTO,

Defendant.

PETITION OF JOSEPH P. McCONNON FOR REHEARING APPEAL AND/OR FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Joseph P. McConnon, by his attorneys, Lieberman, Katz & Aronson, Esqs., respectfully petitions this Court for a rehearing in the appeal in the above entitled case, and if denied, for a stay of the mandate and for a continuance of bail pending an application for a writ of certiorari, and in support thereof, respectfully shows:

UNITED STATES COURT OF APPEALS
FILED
MAR 3 1957
SECOND CIRCUIT

I.

Nowhere in its opinion of February 21, 1957, affirming the judgment of conviction, did the Court indicate that it was not prejudicial to McConnon to try the case upon an indictment charging a conspiracy from June, 1951 to April, 1955 "to cause work stoppages" (under the indictment the government was permitted to introduce testimony of a threat made by Postma in 1951 and of the course of bitter bargaining in 1952 between the union and the truckers, culminating in a strike, which began on November 7, 1952 after collective bargaining broke down when "Postma unexpectedly refused the truckers' offer in a surly manner", as this Court put it), and to convict him on the theory that the conspiracy was to interfere with commerce by extorting money "under threat of continuing a strike". Surely there is a vital difference between a conspiracy to cause strikes and a conspiracy to continue a strike. The range and latitude of the inquiry is much broader in the former than in the latter. If, as the Court stated in its opinion, the conspiracy of which McConnon was convicted was a conspiracy to continue the strike entered into on November 13, 1952, then all the testimony of occurrences prior to the strike was improperly and prejudicially received.

We submit that there was a fatal variance between the conspiracy charged in the indictment which was "to cause work stoppages" and a conspiracy to *continue* a strike,—fatal because the variance was sorely prejudicial to McConnon, who, as this Court agreed, "for the first time cooperated with Postma after the strike had begun" on November 13, 1952. On the basis of the charged conspiracy, a mass of evidence of excessive demands by the union and surly conduct of Postma was introduced at the trial, the effect of which was to inflame the jury and to deprive McConnon of a fair trial.

If it is true that the conspiracy was one based upon the fact that McConnon "cooperated" with Postma after the strike began, as this Court said, then the charge to the jury was erroneous and misleading, for it was predicated on the government's theory that there existed a conspiracy prior to the inception of the strike, of which Postma was a member and which "McConnon joined at a later date" (R. 567a).

This Court in its opinion indicated that the conspiracy was "to exploit the strike" and that McConnon's guilt derives from the fact that he "allied himself with Postma's effort to shakedown the truckers". This being so, it is plain that the introduction of the mass of evidence of exacerbated contract negotiations was wholly unfair to McConnon.

We respectfully submit that it is error to try a defendant upon an indictment charging a conspiracy found to be non-existent and, under cover of such an indictment, to introduce a mass of evidence wholly irrelevant to a conspiracy ultimately found to be a basis upon which to sustain the verdict of the jury. Such a variance is so prejudicial as to require a reversal.

II.

In holding that McConnon was guilty of conspiracy because he "cooperated" with Postma "in committing an illegal act", the Court overlooked the established legal principle that one who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *U. S.*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those

> terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

There was no proof here that there was an agreement to cause or to continue the strike; nor was there an agreement to coerce the truckers by threat to continue the strike. Under the evidence, McConnon and Postma might have been convicted of the substantive crime of extortion had such a count been contained in the indictment; but, we submit, McConnon could not be convicted of conspiracy, the only count upon which the government elected to try this case.

III.

We respectfully submit that the Court erred in holding that "any difference (between McConnon and Postma) in their motives or in their relationship to the parties to the strike is without significance for present purposes". Such differences, we believe, are crucial in a determination of the existence of criminal intent. Unless McConnon entertained the intent "to interfere with interstate commerce by extorting money * * * under threat of continuing a strike" he cannot be convicted of conspiracy.

The differences in motivation and relationship between the parties are of vital and discriminating significance in this type of case. In a New York case of extortion (during the Congressional debates on the Hobbs Act the sponsors repeatedly stated that the definition of extortion in the Hobbs Act was taken from the definition of extortion in the New York Act), the Court of Appeals of New York

stressed the very difference this Court deems to be of no significance. In *Scheppa* v. *New York*, 295 N. Y. 359, Scheppa and Calabria were indicted on two counts for obtaining money from Ambrogi by means of threats; one for conspiracy and the other for the substantive crime of extortion. At the close of the trial, *the conspiracy charge was dismissed.* Calabria was acquitted and Scheppa was convicted of extortion. The State argued that the two defendants were acting together that is, that they cooperated, each with the same guilty intent. (Similarly this Court bases its opinion on the fact that McConnon cooperated with Postma.) The facts showed that Calabria took part in the very conversation in which the threats were made; indeed he talked to Ambrogi out of Scheppa's hearing, elaborated on Scheppa's threatening statements and urged Ambrogi to make the payments demanded. (McConnon talked with Vogel but did not make any threatening statement nor did he urge Vogel to make the payment demanded.) There was no proof that Calabria, to whom the money was paid by Ambrogi, turned it over to Scheppa. (McConnon delivered the money to Postma.) Scheppa contended that if Calabria was not guilty, he could not be found guilty. The Court held that there was a vital difference between the two defendants from which the jury could find that

> "Calabria was acting, not for, or collaborator with, appellant but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve better than valor in resistance."

Though it might be said here that the jury *might* have found that McConnon was acting for, with and as collaborator of Postma, the question to be decided is whether under the testimony here, such a conclusion could fairly be reached without appraisal of the motives of McConnon and Postma and their respective relationships to the parties to the labor dispute. We respectfully urge that in

the instant case, as in the *Scheppa* case, motive and relationship must be appraised even though, to be sure, the result of so doing led to affirmance in the *Scheppa* case and here leads to reversal.

Said the Court in *Scheppa*:

> "Complainant testified that he himself, at least for the time, thought that Calabria's persuasions, unlike the similar urgings of appellant, were spoken out of friendship for complainant. We think the case was one where jurors might say, that, of the two defendants who urged complainant to part with his money lest he suffer injury, *one had, and the other did not have, a criminal intent.*
>
> "Although both defendants in the present case came to the garage together and each expressed to complainant the same idea—that harm would befall him if he did not suffer the exaction—nevertheless it cannot be said that the evidence is identical as to the two. *Their relations to complainant were different and the jury could draw different inferences as to their motives.*" (Emphasis supplied.)

The *Scheppa* case reveals a more powerfully incriminating charge of cooperation by Calabria with Scheppa than do the facts here as they relate to McConnon and Postma. The difference in motive and relationship was deemed of vital significance in distiguishing between Calabria and Scheppa, and should be so regarded in evaluating the "cooperation" between McConnon and Postma.

If this Court believes that there was evidence from which the jury could have discriminated between McConnon and Postma, then it must agree that the Court below should have charged the jury to that effect and should not have refused to give McConnon's requested charges, Nos. 16, 26, 27 and 31.

IV.

In addition to the foregoing, we respectfully urge that there was no basis for an inference that McConnon agreed to the *mode* set forth in the indictment by which the *object* of the imputed conspiracy was to be carried out. The mode in this case was either to cause or to continue the strike in order to induce fear upon which the defendants could play to induce consent to pay the money. Even if it can be said that there was agreement upon the object, there is no evidence of an agreement on the mode. The law in this regard is of enduring and ancient authority and should have been applied to this case. The principle was laid down in *Rex* v. *Pollman,* 2 Campb. (Eng.) 229, 11 Rev. Rep. 689, and we earnestly request the Court to consider the application of the principle there announced to the facts in this case. In that case, Watson, a member of a banking partnership, was convicted of conspiracy to obtain an appointment to office for another upon the payment of a sum of money as a bribe. The money was put up with Watson's banking firm and Watson knew that it was to be paid over to secure the appointment. It is plain that Watson cooperated in the illegal act involved, yet his conviction was set aside because, said the Court, *it must be proved*

> "that all the defendants were cognizant of the object of the conspiracy *and the mode stated in the indictment by which it was to be carried into effect.* A contrary doctrine would be extremely dangerous. The defendant Watson must be acquitted." (Emphasis supplied.)

What, we ask, was the object, and what the mode in the instant case? Under the Hobbs Act, the object must be "to obstruct, delay or affect commerce" and the mode must be, "by extortion". Can it be said that McConnon agreed to obstruct, delay or affect commerce? Was it not his object to relieve commerce of the obstruction?

If, on the other hand, the object of the conspiracy is taken to be obtaining money, then the mode must be the inducing of consent in the victim to make the payment "by wrongful use of actual or threatened force, violence or fear". Can it be said that McConnon agreed with Postma to *induce* consent? The evidence is merely that McConnon told Vogel the terms upon which Postma would terminate the strike. We submit that there is no basis for a reasonable inference that McConnon agreed with Postma to induce consent or to coerce the truckers or to continue the strike, and that therefore McConnon should be acquitted.

V.

The newspaper publicity must have been prejudicial to McConnon for even this Court, in sustaining the refusal to exclude witnesses, said that it did so "especially in view of the subject matter of the claim next to be discussed (a news story relating to a threatened government witness)". We respectfully suggest that if this news-story was of especial significance in the mind of this Court in appraising the action of the Trial Judge in refusing to exclude the witnesses, it must have had a special and prejudicial impact on the jury of such force as to be ineradicable by the admonition of the Trial Judge. We respectfully request the Court to rehear the case on this point as well as on all others herein advanced, particularly in the light of the fact that Judge Frank indicated that in his opinion this was error, and because his untimely and lamented death deprived McConnon of the right to have a decision of this Court distilled as a product of discussion and interchange between all of the judges who heard the argument.

VI.

The Court in its opinion held that McConnon, himself a victim of the strike, was guilty with Postma of a conspiracy under the Hobbs Act. We respectfully request the Court to reconsider the result of its decision in the light of the purpose and legislative history of the Hobbs Act as contrasted with the purpose of Section 302(a) of the Taft-Hartley Act. Whereas the Hobbs Act was never intended to embrace an employer-victim, Section 302(a) of the Taft-Hartley Act made it a crime for the employer to pay money to a labor representative. If the view of this Court in this case is correct, then an employer may be guilty, for the same activity, of a violation of Section 302(a) of the Taft-Hartley Act and of a violation of the Hobbs Act, as well. Surely Congress intended no such result. It was because the entire thrust of the Hobbs Act was directed solely against the racketeer and not the acquiescing employer, that Section 302(a) of the Taft-Hartley Act was enacted. We therefore urge this Court to reconsider its holding on this point and conclude that McConnon could not be guilty of conspiring with Postma. In this connection, we point out that where the substantive crime, the extortion in this case, cannot be committed without acquiescence, a conspiracy between the extorter and the victim cannot constitute an indictable conspiracy. Said the Court in *Gebhardi v. U. S.*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

Cf. Hornstein v. Paramount Pictures
292 N.Y. 467, 471, 472.

VII.

We respectfully urge that this petition for rehearing be granted, and that the judgment of the District Court be reversed; or, if this petition should be denied, we respectfully pray for a stay of the mandate and a continuance of bail under Rule 46(a)(2) of the Federal Rules of Criminal Procedure pending an application for a writ of certiorari, which application the petitioner, Joseph P. McConnon, intends to make because of the serious, substantial and important questions involved in this case.

And the petitioner will ever pray, etc.

LIEBERMAN, KATZ & ARONSON,
Attorneys for Petitioner and Defendant-Appellant, Joseph P. McConnon.

On this Petition:
ISADORE KATZ.

Certificate of Counsel

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ISADORE KATZ, being duly sworn, on oath, certifies and says that he makes this certificate in compliance with Rule 28 of the Rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and not interposed for delay.

Isadore Katz

Sworn to before me
this 7th day of March 1957
Marshall L. Rosenberg

MARSHALL L. ROSENBERG
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-8650860 Qualified in Queens County

FILED
MAY 3 195
JOHN T. FEY, Cl

No. 968

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
MAY 1957

Docket No. 24114

UNITED STATES OF AMERICA,
Appellee,

v.

PETER POSTMA and JOSEPH P. McCONNON,
Defendants-Appellants,

and

NICHOLAS ROBILOTTO,
Defendant.

PETITION FOR REHEARING

To: The Honorable Judges of the United States Court of Appeals for the Second Circuit:

PETER POSTMA, the Defendant-Appellant above named, presents this, his Petition, for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

It is evident from the opinion of the Court that the Defendant-Appellant Postma has failed to make himself sufficiently clear concerning Point VII in his Supplemental

Brief. This Point deals with the refusal of the Trial Court to exclude witnesses from the courtroom at the request of the Trial Counsel for Defendant-Appellant Postma.

It is not the contention of the Appellant here that an exclusion of witnesses is a matter of absolute right in every case. We recognize that under the Federal cases cited in the opinion, the exclusion of witnesses is, and always has been in the Federal Courts, a matter of discretion with the Trial Court. We feel, however, that there were factors existing in the case which required the Trial Judge to exercise his discretion in favor of the Defendant Postma's motion.

The two factors which we consider most compelling are the extremely long period of time between the date of the alleged crime and the trial of the action, and the very nature of the charge and the evidence adduced to support it.

Over three and one-half years expired between the last act in the alleged conspiracy and the trial of the action. More than four and one-half years expired between the first act of the alleged conspiracy and the trial of the action, as was pointed out in the opinion of the Court herein. After the expiration of the above time, eight Government witnesses testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. When we consider that the testimony concerned conversations, alleged admissions, shades of meaning, innuendo, and other extremely illusory evidence, it is clearly evident that they should not have been allowed to listen to each other testify.

Since the record is devoid of any evidence that the Defendants-Appellants or any one in privity with them made

any attempt to approach or influence any of the witnesses for the prosecution, a decision based on a fear of such circumstance which seriously prejudices the rights of the Defendants-Appellants would hardly seem proper.

It is, therefore, the position of the Defendant-Appellant Postma not that the Defendant in any proceeding has an absolute right to have witnesses excluded from the courtroom, but rather that under the peculiar circumstances existing in his particular case, the failure to exclude witnesses was an improvident exercise of discretion.

II.

The Court in its opinion and concerning the allusion made by the Trial Court to the scales of justice states as follows:

> "To evalute correctly this claim of error it must be borne in mind that the passage complained of immediately follows full and unexceptionable instructions as to reasonable doubt, the applicable burden of proof, and the presumption of innocence."

The Defendant-Appellant can find no quarrel with the above; indeed, we feel that it is the very fact that the use of the metaphor follows the explanation concerning reasonable doubt, which makes its use particularly damaging. A metaphor is a device used to clarify a concept which is difficult to grasp. Its purpose is to explain in concrete form that which in terminology is confusing. If there is no possibility of confusion, there is no need for metaphor and therefore the very fact of its use speaks eloquently for its importance. If the Jury was led to feel that the Defendant could be convicted on a preponderance of the evidence, surely he has been prejudiced.

III.

Your Petitioner feels that a rehearing is urgently required in the action now before this Court, particularly in view of the untimely death of Judge Frank. It is apparent from the notes contained in the opinion of this Court that Judge Frank had convictions contrary to the other two judges of the Court concerning both of the problems discussed in this Petition. Apparently, in preliminary conference he indicated his feelings to the other members of the Court. We feel that the Defendant-Appellant is entitled not only to the individual opinions of each of the members of the Court but, more particularly, to the wisdom of the Court as a whole arrived at after fruitful discussion and interplay of ideas.

For the above reason your Petitioner feels that a reargument is necessary.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

E. STEWART JONES,
Attorney for Petitioner and Defendant-Appellant,
Office and Post Office Address,
28 Second Street,
Troy, N. Y.

IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

UNITED STATES OF AMERICA,
Appellee,

vs.

PETER POSTMA and JOSEPH P. McCONNON,
Defendants-Appellants,

and

NICHOLAS ROBILOTTO,
Defendant.

Docket No. 24114

—o—

Certificate of Counsel.

I, E. STEWART JONES, Esquire, attorney for Defendant-Appellant Postma do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Dated: February 28, 1957.

E. STEWART JONES.

FILED
MAY 9 19
JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1957.

No. 982

UNITED STATES OF AMERICA,
Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,
Petitioner.

Petition of Peter Postma for a Writ of Certiorari.

BARNEY SAMELSTEIN,
Attorney for Petitioner,
28 Second Street,
Troy, New York.

E. STEWART JONES,
Of Counsel.

THE REPORTER COMPANY, INC., Walton, N. Y.—1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

UNITED STATES OF AMERICA,
Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,
Petitioner.

PETITION OF PETER POSTMA FOR A WRIT OF CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

Peter Postma, by his attorney, Barney Samelstein, Esq., respectfully petitions the Court for a Writ of Certiorari to the Court of Appeals, Second Circuit, and in support thereof respectfully shows:

A

The Opinions of the Court Below.

Since the opinions of the Court below have been fully set forth in Appendices A and B of the petition of Joseph P. McConnon, filed herein, we have not annexed same to this petition.

B

The Grounds on Which the Jurisdiction of this Court is Invoked.

The judgment of conviction for conspiracy to violate the Hobbs Act, sought to be reviewed, was rendered and entered by the United States District Court for the Northern District of New York on April 17, 1956. The judgment was affirmed by the Court of Appeals, Second Circuit, on February 21, 1957. A petition for rehearing was filed on March 8, 1957, and denied on April 9, 1957. In the opinion in which rehearing was denied, the Court below stayed its mandate, pending a timely application to this Court for a Writ of Certiorari, and if such be granted, until final dispositive action by this Court; and in the meanwhile bail was continued.

Petitioner believes that this Court has jurisdiction to review the judgment by Writ of Certiorari under Title 28, U. S. C. Sec. 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928.

The grounds on which the jurisdiction of this Court is invoked are that the Court of Appeals in affirming the judgment has decided that

> (1) The Hobbs Act, despite its vagueness, does not violate the Due Process clause of the Fifth Amendment to the Constitution of the United States. This is a question of federal law not yet, but which should be, settled by this Court;
>
> (2) Under the Hobbs Act, the petitioner, himself an employer-victim of a strike, may be found guilty of conspiring with an extorting labor leader in charge of a strike because, during the strike he acted as intermediary between the labor leader and one of the struck employers, carried messages back

and forth and then, at the request of one struck employer, carried the extortion money to the labor leader. This involves a question of federal law, not yet, but which should be, decided by this Court.

(3) The Trial Court departed from the accepted and usual course of judicial proceedings:

(a) In denying a motion to exclude from the courtroom all witnesses awaiting calls to testify;

(b) In charging the jury, even though by the use of a scales-of-justice metaphor, it supplanted the rule of reasonable doubt with the preponderance of evidence rule;

(c) In refusing to charge the jury to distinguish between the intent, motive and purposes of the petitioner and the intent of the labor leader.

C

The Questions Presented for Review.

1. Is the Hobbs Act so vague and indefinite as to be void for vagueness under the Due Process Clause of the Fifth Amendment?

2. Does the conspiracy provision of the Hobbs Act apply to the petitioner, whose business as an operator of trailerships carrying trucks between Albany and New York, N. Y., was halted by a strike of the truck drivers against trucking companies in Albany, because he acted as intermediary between the struck operators and the extorting labor leader in order to bring about the end of the strike and the resumption of his business?

3. Was there proof of conspiracy?

4. Should the Trial Court have charged the jury that the petitioner could not be found guilty of conspiracy unless it was found that he entered into an agreement with the labor leader with the intent to continue the strike until the struck employers paid money under fear of force or violence or threat thereof?

5. Was it prejudicial error for the Trial Court to deny the motion to exclude from the courtroom all witnesses awaiting a call to testify?

6. By his use of the scales-of-justice metaphor, did the Trial Court, in his charge to the jury, substitute the rule of preponderance of evidence for the rule of reasonable doubt and was this reversible error?

7. In the event that a petition for a Writ of Certiorari is granted herein on behalf of the petitioner McConnon, then the petitioner Postma respectfully requests that the Court grant his petition also, since should the conviction of McConnon be reversed, then the petitioner Postma would have been held to be a co-conspirator in a conspiracy in which he alone was held to be guilty.

D

The Statute Involved.

SECTION 1951, TITLE 18, UNITED STATES CODE

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in his section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

E

Statement of the Case.

In an indictment containing a single count of conspiracy, it was charged that from on or about June, 1951, and continuing up to the time of the filing of the indictment, April, 1955, Peter Postma and Nicholas Robilotto, two business agents of a local teamsters' union in Albany, New York, and Joseph P. McConnon "did conspire together • • • to

obstruct, delay and affect interstate commerce * * * by extortion"; that it was a part of said conspiracy that Postma and Robilotto would use their positions in the union to obtain $10,000 from twelve trucking companies by threatening and actually causing work stoppages until the payments were made.

No such conspiracy was proved. At the conclusion of the Government's case, the Trial Court granted a motion to acquit Robilotto. McConnon did not testify. Both Postma and McConnon were found guilty by the Jury.

The Court of Appeals said that they were found guilty of conspiring to interfere with interstate commerce by extorting money "under threat of continuing the strike" which, said the Court of Appeals, "is precisely the conspiracy charged in paragraph 1 of the indictment", though the indictment referred to a conspiracy to cause strikes.

Under cover of the indictment, the Government introduced a great mass of testimony of bitter labor negotiations between the representatives of an association of trucking companies and the local teamsters' union, beginning in June, 1951, when Postma, the chief union negotiator, gracelessly accepted an increase of 13 cents per hour under a wage reopening clause and said, "Next year, when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are in the street, I will jam it down your throat" (58a, 201a, 407a),* and continuing up until the advent of the strike on November 7, 1952, when negotiations for a new contract broke down.

The overwhelming mass of testimony in the case consisted of angry recitations by the employers of the course of these negotiations, the union demands for a new contract which the employers characterized as grossly exorbitant, and the surly manner in which Postma carried on the negotiations.

---

* References in parentheses are to the printed Appendix filed in the Court of Appeals and in this Court.

McConnon had not the slightest connection with any of these matters of which the employers complained so bitterly. He was himself an employer who operated Trailerships, Inc., in Albany, New York, which transported truck trailers by ship on the Hudson River (150a).

He was not connected with the teamsters' local union nor was he involved in the labor relations or negotiations between the local union and the trucking employers (180a). He solicited business from the trucking employers and maintained warm, friendly and cordial relations, both socially and commercially, before and after his alleged part in the conspiracy, with John J. Vogel, Jr., a trucking employer, the chief government witness.

The strike of the truck drivers necessarily halted the operations of Trailerships, Inc.

The only significant testimony concerning McConnon was given by John J. Vogel, Jr. On November 13, 1952, on the sixth day of the strike, McConnon, who was as much affected by the strike as the struck trucking employers, came to a table in a hotel bar and grill in Albany where Vogel and Mayberry, another trucking employer, were seated. McConnon talked for a few minutes "about why don't we get the strike settled and his Trailerships were not in operation, he was losing money, and that kind of discussion and, as I recall it, he motioned for John Vogel to go out in the hall, he would like to talk to him" (214a). Vogel went with McConnon into the hallway of the hotel where McConnon said, so Vogel testified, "If you will offer the seven points, and $10,000, that Pete will settle the strike" (74a). The seven points referred to union demands concerning wages and fringe benefits.

Vogel said nothing to McConnon but returned to the table and told Mayberry that Postma wanted the seven points and $10,000 (82a). Vogel testified that he was scared, that he was thinking of other struck operators signing "if and when" contracts to get their trucks rolling,

and that he could not stay in business very long if he had to sign the "if and when" contract (79a). Despite such fears, recited as well by the other employers, Vogel and Mayberry, and Dastoli, another trucking employer who joined them at the table, immediately wrote down the seven points in dispute, prepared a list of truckers and the amounts each might contribute toward the $10,000, and then repaired to the truckers' strike headquarters in the hotel where they discussed the matter with a number of operators who were there at the time (83a-90a). "We told them", said Vogel, "the story of what happened and they were willing to go along with it to get the strike over" (91a). Vogel then told McConnon that the operators would pay the $10,000 and McConnon left.

On the next day, McConnon told Vogel, "Nick (meaning Robilotto) then had got his oar in and they wanted $30,000 instead of ten" (92a), which the truckers refused to pay. On Saturday, according to Vogel, McConnon told Vogel that "Pete and they would then take the $10,000", and that "they wanted a small committee and get a separate room" (96a) for a meeting between three union and three employer representatives. The meeting took place that afternoon. McConnon was not present. According to Vogel, there was talk about a union convention, but no talk about the strike for several hours, when suddenly, "I walked over to one side of the room with Postma", and Postma said, " 'That this town is very small and these operators will talk' and I said nothing, and he finally said to me, 'Well, they are all getting theirs, I am going to get mine' " (102a). Vogel and Postma then returned to their seats and in a very few minutes it was agreed to settle the strike on the seven points consisting of a wage increase of 10 cents per hour and certain fringe benefits.

Immediately after the meeting, Vogel began to collect the various contributions from the other truckers. The next day, Sunday, the union membership at a meeting voted to terminate the strike and the trucks began to roll.

On the following Tuesday, without any prior discussion or arrangements, and at a time when McConnon, as was his wont, came to Vogel's office on business, Vogel gave him $7,500 "and he could take it to Postma" (193a). On the following Tuesday, again without any prearrangement and at a time when McConnon dropped in to see Vogel on business, Vogel gave $2,500 to McConnon for delivery to Postma, together with a list of the contributors. McConnon told Vogel that he had given the money to Postma (114a). Several months later, Postma told Vogel that he had received the $10,000.

Hickey, a Vice-President of the International Brotherhood of Teamsters, testified that about a year later McConnon came to his office in New York and told him about the strike, its effect upon the business of Trailerships, Inc., and that "he became an interested party in trying to solve or settle the strike so the Trailerships could get back in operation" (488a), that he had talked with Postma who agreed that the strike could be settled for a certain amount of money and that he got the money from Vogel and passed it on to Postma (491a).

On this testimony, the Court of Appeals held that "McConnon intentionally and actively *allied* himself with Postma's effort to shake down the truckers;" that "each knowingly *co-operated* in an effort to *coerce* the truckers, through fear of economic consequence of a continuation of the strike, to pay Postma a sum of money for its termination"; that "the mere fact that a continuation of the strike, directly or indirectly, would work economic hardship, directly or indirectly, on McConnon, did not justify his *co-operation* with Postma in committing an illegal act" (Opinion of the Court of Appeals; emphasis supplied).

In its opinion, denying McConnon's petition for rehearing, the Court held that there was no prejudicial variance between the conspiracy charged in the indictment and the alleged conspiracy found lurking in the testimony to

support the verdict of the jury. "It is true," said the Court of Appeals, "that there was insufficient proof to hold Robilotto and as a result *the conspiracy charged was not proved to have existence until McConnon and Postma began to co-operate in a plan involving extortion*" (emphasis supplied).

Referring to petitioner's complaint that the introduction of the testimony of many bitter employers of prestrike events had prejudiced him, the Court said that, "It was admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware." This is a most curious statement for there was absolutely no testimony that McConnon "was aware" of any designs, legal or illegal, nourished by Postma against the operators. The testimony was clear that McConnon had no connection at all with any of the activities of the union or with Postma's activities which led up to the strike. He, like the struck employers, was adversely affected by the strike and, with them, entertained fears of economic loss flowing from the strike. If the crux of the case against him is that he co-operated, the evidence is clear that he co-operated in the same manner that Vogel co-operated to bring about a termination of the strike. His motion for a judgment of acquittal should have been granted.

The petitioner unsuccessfully challenged the fairness at the trial of the refusal of the Trial Court to exclude witnesses awaiting calls to testify from the courtroom while other witnesses were testifying; and made several objections to the failure of the Court to charge the jury concerning McConnon's intent and generally excepted to the adequacy of the charge.

F

ARGUMENT.

POINT I

The Hobbs Act is void for vagueness under the due process clause of the Fifth Amendment to the Constitution of the United States.

Though this Court did decide in *United States v. Green*, ... U. S. ....., that the Hobbs Act, 18 U. S. C. Sec. 1951, was a valid exercise of legislative power under the Commerce Clause, it has not yet decided whether the Hobbs Act is sufficiently definite and clear under the Due Process clause to survive its tests. The Court below said, rejecting our argument that the Hobbs Act was void for vagueness,

> "The Supreme Court has not yet dealt with the contentions of the appellants here."

A final determination of this important question is peculiarly necessary at this time in the administration of the Act.

In the instant case, the Court below relied upon its prior decisions, particularly *United States v. Varlack*, 225 F. 2d 665, in which it had said that

> "The terms of the present statute are no more vague than those of its predecessor."

and cited *Nick v. United States*, 122 F. 2d 660, and *Campagna v. United States*, 146 F. 2d 524, which had dealt with the constitutionality of the predecessor Anti-Racketeering Act of 1934, the Copeland Act, 48 Stat. 979-980, 73rd Cong. 2d Sess., under the Commerce Clause. But the Hobbs Act differs in many material and significant provisions from its predecessor. Congressman Hobbs, the author of the present Act, declared, during the debates in the House,

> "The reason we left out Section 6 of the Copeland Act is the same reason we left out every word of the

> Copeland Act. We wiped the whole thing out and substituted a bill that cannot be misunderstood" (91 Cong. Rec. 11,900).

The new Act changed the title of the Copeland Act from

> "an Act to protect trade and commerce against interference, threats, *coercion* or intimidation." (Emphasis supplied.)

to

> "interference with commerce by threats or violence."

The word "coercion" was omitted from the definition of the crime and the gist of the crime was changed to

> "Whoever in any way or degree obstructs, delays or affects commerce * * * by * * * extortion * * *."

Whereas the Copeland Act had defined the word "wrongful", that definition was deleted from the Hobbs Act and now the word "wrongful", pregnant with a variety of meanings, stands undefined in the Act.

Furthermore, the definition of the word "extortion" was changed from

> "obtains the property of another, with his consent, induced by wrongful use of force or fear * * *."

to

> "the obtaining of property from another with his consent induced by wrongful use of *actual or threatened* force, *violence* or fear * * *." (Emphasis supplied.)

The word "coercion" was omitted from the Hobbs Act because of labor representations at the legislative hearings (77th Cong., Apr. and May, 1942) so as to make clear that the Act was directed at interference with the transportation of goods in interstate commerce and was not intended to impair or affect the right to strike or other rights contained in the federal labor statutes set forth in Section (c) of the Act.

The result of the changes was, we submit, to make the Hobbs Act even more obscure and more vague than its

predecessor had been. It does not contain ascertainable standards of guilt so that men of reasonable intelligence may have fair warning of the prohibited activity. It is because the words "affects commerce," "wrongful" and "fear" are so broad, indefinite and variegated in meaning that men of reasonable intelligence can only guess at their meaning in the statute. Because of the lack of precision in this criminal statute, acts thought to be beyond the scope of the federal authority under the Commerce Clause and within state police power are found to be punishable under the Hobbs Act; labor activity deemed to be protected under the federal labor statutes is presented as being wrongful, see dissenting opinion in *United States v. Kemble*, 198 F. 2d 880; and fear of economic loss flowing from strikes is deemed to be the kind of fear envisaged by the Hobbs Act, see *United States v. Varlack, supra*, and cases therein cited.

Moreover, the lack of clarity in the Hobbs Act permits its extension to conspiracies to "continue strikes" as well as to "cause strikes" as in the instant case, and to reach a "shakedown" to stop a strike, even though this very activity was expressly declared to be beyond the scope of the Act. During the course of the debate on the Hobbs bill in the House, Representative Sumner asked:

> "There have been complaints that in the case of strikes, an attorney has gone in and asked an operator for something like $15,000 to $20,000, as a shakedown to stop a strike. Is there anything in the bill about that?"

Mr. Jennings, one of the Managers of the bill, replied:

> "Not a thing. This does not have a thing to do with strikes" (91 Cong. Rec. 11,912).

a. The Term "Affects Commerce" is as Broad as Congressional Power to Legislate but Does Not Describe a Prohibited Act.

The Act makes it a crime to obstruct, delay or affect commerce by extortion. We are at a loss to understand whether the word "affects" is to be read *in pari materia* with the words "obstructs" and "delays" or whether it stands separate and apart from them and means something more than interference with commerce by obstruction or delay. The term "affects commerce" is used by Congress when it wishes to bring aspects of commerce within its constitutional power and connotes the broad reach of that power. It does not, however, offer any clue as to the nature of the prohibited condition of commerce that may not be brought about by extortion without violating the Act. "Affects" means "influence" and commerce may be influenced adversely or beneficially. The Act gives no indication of whether either or both results are prohibited. One may affect commerce by obstructing it, or delaying it, or restraining it, or controlling it, or monopolizing it, or preserving it, or restoring it, or protecting it. In what sense is it used in the Hobbs Act?

Section (c) of the Hobbs Act surely uses the word "affect" in a sense different from its usage in Section (a). In what sense is it employed in Section (a)?

Because of the difficulty in ascribing a definite meaning to the term "affects commerce", the lower Court had held in *United States v. Varlack, supra,* that in a prosecution under the Hobbs Act it is not necessary for the prosecution to prove

> "That it was the purpose of the conspiracy to affect interstate commerce."

This, said the Court, was a matter of law and the only question open to the jury was whether the acts of the defendant constituted extortion. Thus it had become the

practice to try cases under the Hobbs Act as though the crime was the crime of extortion in interstate commerce instead of "affecting commerce by extortion".

Not only does the term "affects commerce" stand undefined in the Hobbs Act but there is no definition of it in any federal act. It is not a term of art and there are no common-law precedents to give it content.

It has been difficult enough for this Court to give meaning to the term "affecting commerce" under the Commerce Clause involving the process of adjusting the interacting areas of national and state authority over commerce.

"Precisely the same kind of issues has plagued the two great English-speaking federations," said this Court in *Polish Alliance v. N. L. R. B.*, 322 U. S. 643; and, "There is no single concept of interstate commerce which may be applied to every federal statute regulating commerce," said the Court in *McLeod v. Threlkeld*, 319 U. S. 491, 495; and "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle", warned the Court in *Kirschbaum v. Walling*, 316 U. S. 517.

If the term is so difficult of definition when it relates to marking out the constitutional boundaries within which Congress may legislate as to plague two nations and to be equivalent to the futile attempt to square the circle, how can it be deemed sufficiently definite and certain to define a crime? Can it be said that the citizen acted at his peril because he could not in advance resolve this great and historic issue which has plagued two nations? Can it be said that a penal statute whose operation turns upon the determination of such a complex issue as the distribution of governmental power between national and state authorities is sufficiently definite and clear to survive the test of the due process clause? We believe not.

"Affecting commerce" is defined in the National Labor Relations Act, Sec. 2(7), in a most unique and singular fashion admirably tailored to the needs and purposes of that Act but wholly inappropriate to the purposes of the Hobbs Act. Despite the highly specialized definition of the term "affecting commerce" in the National Labor Relations Act, the problem of determining whether the unfair labor practices present in each case affect commerce under that Act has continuously troubled the Board and the courts. In that Act Congress made a finding and declared a policy with respect to labor disputes and their effects upon interstate commerce. No such legislative finding is present in the Hobbs Act. Consequently none of the cases decided under the National Labor Relations Act furnish any guide as to the meaning of the phrase "affects commerce" as used in the Hobbs Act. We submit, therefore, that the term "affects commerce" in the Hobbs Act are words which are vague and fluid and "may be as much a trap for the innocent as the ancient laws of Caligula", *United States v. Cardiff*, 344 U. S. 175, 176.

The word "affects" is surely as vague as the word "restrains" and yet it was only because of the common-law meaning attributable to the word "restrains" that the Sherman Act was saved from being held void for vagueness, *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Apex Hosiery Co. v. Leader*, 310 U. S. 469.

The more inclusive phrase in the Hobbs Act, "in any way or degree affects commerce", renders the term "affects commerce" even more vague and indefinite, since no citizen could be possessed of such wisdom as to know whether or not his acts would or would not in any way or degree affect commerce.

b. "Wrongful" as the Critical Word in the Definition of Extortion Has No Clear Meaning.

We noted above that the definition of the word "wrongful" contained in the Copeland Act had been deleted from the Hobbs Act. Some effect must be given to this deliberate excision by Congress of a critically important definition of probably the most crucial word in the definition of extortion in the Hobbs Act. In *Callanan v. United States,* 223 F. 2d 171, the Court ascribed to the word "wrongful" the same definition which had been stricken by Congress and held that despite the omission, Congress did not intend to change the meaning of the word as defined in the Copeland Act. What was easily determined by the Court in the *Callanan* case presented great difficulties to the dissenters in *United States v. Kemble, supra,* in which the dissenters held that the word "wrongful" is not a "term of strong art in the criminal law" and that it includes both public and private wrongs.

"Wrongful" as used in the Hobbs Act is the very essence of the definition of extortion. If this word is obscure, ambiguous or vague, it cannot be said that there is no difficulty in distinguishing the licit from the illicit and hence the statute must fall as a denial of due process.

The test to be applied is the intelligence of common men. It will not do to say that a man of common intelligence knows what "wrongful" means any more than it is proper to say that such a man knows what the word "sacrilegious" means. "Wrongful" is surely as vague as "sacrilegious" which was explored in *Burstyn v. Wilson,* 343 U. S. 495, in an exhaustive search to find its meaning. To search for the meaning of the word "wrongful" must be far less rewarding than a search for the meaning of "sacrilegious" for that which is "sacrilegious" is subsumed under the more inclusive concept of the "wrongful".

The term "wrongful use" in the Hobbs Act is no more definite than the term "unjust rate". Both invite use of

moral concepts and are equally deficient under the requirements of the due process clause. See *United States v. Cohen Grocery Co.*, 225 U. S. 81.

The phrase "without just cause or legal excuse", a phrase commonly used in tort law, was held to be too vague in *Thornhill v. Alabama*, 310 U. S. 88. The words "wrongful use" are surely no more certain than the phrase "lawful occupation" at which this Court looked askance in *Lanzetta v. New Jersey*, 306 U. S. 451, while it struck down the statute on the ground of vagueness and ambiguity because of the use of the word "gang",—a word possessed of a variety of meanings.

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States v. Cardiff, supra.*

Precisely in point is *International Longshoremen & Warehousemen Union of America v. Ackerman*, 82 F. Supp. 65, 104-106, in which a criminal conspiracy statute of Hawaii was held to be unduly vague because of its use of the word "wrongful".

Likewise in *United States v. Reese*, 92 U. S. 214, a statute penalizing the *wrongful* refusal of an election officer to receive a ballot was declared to be void for vagueness. Said the Court:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

Section (c) of the Hobbs Act compounds the difficulty. That Section reinforces the labor laws, including the National Labor Relations Act, and that Act sets forth many wrongful acts by labor unions. For example, if a union failed to send the strike notices required by Sec. 8(d) of

the National Labor Relations Act, a strike for higher wages is unlawful and the employer may discharge the strikers. Such a strike could well be deemed to be a wrongful use of threatened force or fear and in violation of the Hobbs Act. Again, a strike is unlawful under the National Labor Relations Act if its purpose is in violation of the secondary boycott provisions of that Act. Would such a strike be a wrongful use of actual or threatened fear under the Hobbs Act?

c. The Meaning of the Word "Fear" Cannot Be Ascertained From the Statute.

The word "fear" is so broad as to be another copacious net such as that condemned in the *Reese* case, *supra*. Fear of what? Unlike the New York statute, Penal Law, Section 851, which defines "fear," the Hobbs Act does not declare the kinds of fear which constitute extortion. During the course of the legislative debates it was repeatedly said by the Managers of the bill that it was intended to fashion the Hobbs Act upon the New York Extortion Statute. But the New York definitions were not included in the Hobbs Act. As a result, and despite the omission of the word "coercion", which had been contained in the Copeland Act, the courts are extending the Hobbs Act to include fear of economic loss whereas it would appear that the Hobbs Act was directed only at fear of force or violence.

This Court seems to us to have at least intimated in *United States* v. *Green, supra,* that the Act does not embrace every kind of fear but rather relates to fear of force or violence alone. This Court, in speaking of the Hobbs Act, said that it was a statute which struck at labor officials who attempt "to get personal property through threats of force or violence."

In showing the relationship between the Hobbs Act and its predecessor, this Court said,

> "The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out of state truckers by threats and violence. *The Hobbs Act was meant to stop just such conduct.*" (emphasis supplied)

We think it is significant that in footnote 7 in the *Green* case, this Court omitted reference to those cases such as *U. S.* v. *Varlack, supra; Bianchi* v. *United States*, 219 F. 2d 182, cert. den. 349 U. S. 915; *Hulahan* v. *United States*, 214 F. 2d 441, cert. den. 348 U. S. 856; *Callanan* v. *United States*, 223 F. 2d 171, cert. den. 350 U. S. 852, reh. den. 350 U. S. 926; in which cases several Courts of Appeals had held that the Act was broad enough to include fear of economic loss as well as fear of force and violence or threats of force or violence. The only case under the Hobbs Act of which this Court took notice in the *Green* case was *United States* v. *Kemble*, 198 F. 2d 889, in which the fear arose because of force and violence. We think the omission of these cases suggests that these cases in the view of this Court extended the ambit of the Hobbs Act. We refer to these cases to show that the word "fear" is too flexible for use in a criminal statute.

Since the word "fear" is so vague, broad, ambiguous and indefinite as to embrace fear of economic loss, though such fear does not seem to be included within the Hobbs Act, we respectfully submit that the use of the word "fear" in the Hobbs Act renders the Act void for vagueness.

In sum then, we submit under this Point that the Hobbs Act contains words and phrases which are so vague, indefinite and uncertain in their meaning that the statute must be stricken down as violative of the due process clause of the Fifth Amendment.

If this Court is of the opinion that the statute is not unconstitutional under the Due Process clause, then we submit that it should be so construed as to exclude fear of economic loss and be limited to fear of actual force and violence or threats thereof.

POINT II

Since the substantive crime of the Hobbs Act cannot be committed without cooperative action, there can be no indictable conspiracy under that Act between McConnon and Postma.

Assuming in this point, *arguendo* only, that McConnon did agree with Postma to affect interstate commerce by extortion, or, to state it as the Court below did in its opinion denying the petition for rehearing, that they agreed to interfere with interstate commerce by extorting money under threat of continuing a strike, we submit that such an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. There can be no conspiracy between extorter and victim under the Hobbs Act, which makes the substantive crime depend upon cooperative action, any more that there can be an indictable conspiracy between the raper and his under-age acquiescent victim. Said this Court in *Gebhardi* v. *United States*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

It is beyond dispute that McConnon was himself a victim of the strike; his business, like that of Vogel and the other operators, had been interrupted by the strike. He, like Vogel and the other operators, was under the same economic pressure to get the trucks rolling. His purposes and motives were the same as those of the truck operators. Pressure upon them was pressure upon him. The situa-

tion here is analogous to that in *United States* v. *Campagna,* 146 F. 2d 524, in which operators of cinema-theatres were subjected to strikes, violence and threats, and this pressure led immediately to pressure upon the distributors of the motion pictures who were in vertical industrial relationship to the operators. There was no direct pressure, violence, threats or other interference with the employment relations of the distributors. It was the distributors who paid the extortion money in Campagna. Surely this Court would not countenance the inclusion in that conspiracy of the distributors who collected the extortion money and turned it over to the extorters! Although McConnon did not contribute a share of the money paid over, McConnon "cooperated" as the medium by which his industrial allies paid over the money just as Vogel also cooperated by collecting the allocated shares of the extortion money from the other struck employers. The government did not indict Vogel, no doubt because of the legal principle set forth in the *Gebhardi* case. It should not have indicted McConnon for he, like Vogel, could not be found guilty of conspiracy with Postma in violation of the Act because he had "cooperated" with Postma in committing an illegal act.

Moreover, during the course of the legislative debate on the Hobbs Act, Congressman Hobbs stated on the floor of the House that the definition of extortion contained in the Bill had been construed many times and "comes from the New York Code" (91 Cong. Rec. 11,900). The New York Act was never intended to embrace an employer-victim. The New York Court of Appeals so held in *Hornstein* v. *Paramount Pictures,* 292 N. Y. 467, 471-472. Since the Hobbs Act is the federal counterpart of the New York Extortion Statute, it must be concluded that the Hobbs Act like the New York Extortion Act does not include the employer-victim within its scope.

In addition, the entire thrust of the Hobbs Act was against the extorting racketeer and not against the

acquiescent employer. The course of the debates in Congress makes this abundantly plain. It was not until Section 302(a) of Labor Management Relations Act, 1947, was enacted that it was made a crime for an employer to pay money to a labor representative. If the view of the Court below is correct with respect to conspiracies in violation of the Hobbs Act, then an acquiescing employer who cooperates with a labor racketeer by paying money over to him to bring a strike to an end may be found quilty for the same activity of a violation of the Hobbs Act as well as of Section 302(a) of the Labor Management Relations Act, 1947. We submit that Congress intended no such result and that the Hobbs Act should be so construed as to exclude McConnon, an employer-victim of Postma's activity, from its scope.

POINT III

There was no proof of a conspiracy between McConnon and Postma.

The indictment alleged a conspiracy between Postma and Robilotto, the two business agents of the local union, and McConnon which originated in a statement made by Postma in June, 1951, that when the labor contract expired in 1952 he, Postma, would present a proposal to the operators that they could accept and "when you are in the street, I will jam it down your throat." At best, this was a threat to force a strike more than one year later. It cannot be deemed to be a threat to obstruct, delay or affect interstate commerce *by extortion.* Nevertheless, under the pretext that this statement in June, 1951 was the point of origin of an unlawful conspiracy, the government introduced over objection, in repetitive fashion, through a succession of bitter witnesses, a mass of highly inflammatory testimony of exacerbated contract negotiations in which the union prepared and presented ex-

cessive demands through the dominant and domineering Postma,—all of which testimony was calculated to, and did, arouse the passionate hostility of the jury. When the government rested it was abundantly clear that Robilotto was involved in no conspiracy as charged in the indictment. He was therefore acquitted on motion by the Trial Court. There remained then only Postma, the sole "conspirator" with whom McConnon could have joined as "co-conspirator".

It is now said by the Court below that the conspiracy was not the one alleged in the indictment. At the trial, however, the government and the Trial Court tried the case on the theory that there was a pre-existing conspiracy between Postma and Robilotto in which McConnon joined after the strike began. There was no such conspiracy for McConnon to join.

The Trial Court refused to acquit McConnon on the theory that "a man becomes a conspirator or a member of a conspiracy or makes a plan which is only in one man's mind and becomes a conspiracy when he has knowledge of it and with a wilful, deliberate, affirmative act upon his part furthers it" (518a). Since McConnon did not testify or offer any testimony, the case against him stood as it did when the government rested and McConnon moved for an acquittal. At this point, it was plain, as the Court of Appeals said in its opinion denying the petition for re-hearing:

> "that there was insufficient proof to hold Robilotto and as a result, *the conspiracy charged was not proved* to have existence until McConnon and Postma began to cooperate in a plan involving extortion." (Emphasis supplied)

The search for the existence of a conspiracy led the Court of Appeals to the conclusion that the only "conspiracy" which could be found to support the judgment came into existence when McConnon and Postma began to cooperate after the strike began. Neither the govern-

ment nor the Trial Court had viewed this cooperation, as the Court of Appeals put it, to be the conspiracy set forth in the indictment. The charge to the jury did not point to this as the conspiracy of which McConnon was accused. Instead the Trial Judge instructed the jury that it could find that McConnon joined a pre-existent conspiracy. Said the Trial Judge in his charge

> "• • • an individual becomes a member of a conspiracy by his intentional participation in it or in his conscious, active cooperation in the furtherance of its purpose. It is not necessary that he be its creator or co-author but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective. (747a-748a)
>
> • • •
>
> "The government contends that in pursuance of this alleged plan or conspiracy that McConnon made or transmitted a demand, or a request, to the effect that the strike could be settled upon the giving of certain points and the payment of $10,000.00.
>
> "The government contends that Mr. McConnon with his knowledge of the existence of the plan or scheme to extort money wilfully, deliberately and knowingly allied himself with it, took an affirmative step to the consummation of the plan.
>
> • • •
>
> "The government claims that Postma, as I understand it, was a member and he allied himself within—with that scheme or plan over a period of time whereas McConnon joined at a later date." (756a)

Plainly the charge to the jury referred to a pre-existent conspiracy which the Court of Appeals now finds did not exist.

It was only after the jury returned its verdict and the case was on appeal that the government suggested that

the conspiracy consisted of the cooperation with Postma by McConnon. If this be the conspiracy relied upon to support the judgment of conviction, then, we submit, there was a grossly prejudicial variance between the indictment and the proof. But more than this, there is no evidence to support the conclusion that there was any agreement between McConnon and Postma. Without an agreement there can be no conspiracy.

Contrary to the opinion of the Court below, there was no evidence that McConnon and Postma "each knowingly cooperated in an effort to coerce the truckers". McConnon did not cooperate in any act of coercion. We note parenthetically at this point that the word "coercion" which had been contained in the Copeland Act, had been deleted from the Hobbs Act. No one testified that any act of McConnon was coercive.

Though the Court below sustained the conviction of McConnon it did so not because there was proof of a conspiracy but rather, as it said, because "McConnon intentionally and actively allied himself with Postma's effort to shakedown the truckers", and because of "his cooperation with Postma in committing an illegal act",—in short, because McConnon aided and abetted Postma in committing the substantive offense defined in the Hobbs Act. This cooperation might have been sufficient to sustain a conviction of McConnon as a principal with Postma had they been indicted for violation of the substantive crime; but this lately conceived theory of the case cannot serve to convict Postma. One who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *United States*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

We submit, therefore, that the Court below erred in holding that Postma was properly convicted of conspiracy upon proof that he aided and abetted Postma in committing an illegal act.

POINT IV

By the use of the scales-of-justice metaphor in his charge to the jury, the Trial Court misled the jury to believe that the Government need only prove its case by a proponderance of the evidence rather than beyond a reasonable doubt.

In the course of the charge to the jury, the trial judge charged the jury on the burden of proof and reasonable doubt and the presumption of innocence. This was immediately followed by an explanation of a method whereby the jury could weigh the evidence and "determine whether or not the evidence produced by the government has established the violation". He then made use of the scales metaphor and said

> "if you determine that the total of the evidence *inclines the scales* to the contention of the Government, then you *would say*, or attach to that evidence, you *could say* it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.

> "If, on the other hand, in weighing the evidence the scales are evenly balanced, or they *incline* to the defendants' contention, then you would say that the Government has not borne, carried the weight of the evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole." (750a-751a) (Emphasis supplied)

Judge Frank, who heard argument as a part of the Court of Appeals and participated in the decision but died before the opinion was written, indicated in an informal conference memorandum a disposition to reverse on this point as well as upon another point discussed in our next and final point. It was his view, as it is ours, that the use of the scales metaphor indicated to the jury a modification of the earlier instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict.

The Court below, consisting after Judge Frank's death of Clark, Chief Judge, and Hincks, Circuit Judge, said "in a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable but that in the context of the full charge given in this case, we think no fatal misunderstanding resulted." The Court of Appeals sought to show that despite the undesirability of the use of the scales metaphor and despite its lack of helpfulness, a rational analysis of the charge shows that the charge on reasonable doubt remained unimpaired. We submit, however, that it is not a question of whether a printed copy of the charge can be evaluated and analyzed to show that it "gave the impression that to convict it was necessary that the Government's evidence not only should be 'more weighty' but also that it must satisfy every reasonable doubt," but rather whether such a metaphor in a charge to a jury does not have such impact on the jury as to override general instructions of reasonable doubt. Indeed the

function of the metaphor is to make clear that which might be too subtle for easy understanding and to give concreteness to the abstract and the general. The tendency of the metaphor is to supplant the general statement it was used to explain.

If, by the use of the scales metaphor, there was a misdirection which the jury might have followed, the error was prejudicial and the judgment should be reversed. We respectfully submit that the jury was misled by the metaphor and that this error was so prejudicial as to require a reversal of the judgment.

POINT V

The Trial Court erred in denying the motion to exclude from the court room witnesses awaiting calls to testify.

At the beginning of the trial and before any testimony was taken, a motion was made that all witnesses awaiting calls to testify should be excluded from the courtroom. The basis for the motion was, as stated by counsel for one of the defendants, that there were in the courtroom a large number of individuals named in the indictment as witnesses and that their testimony would no doubt be repeated. The motion was made, said counsel, so that, "We won't have a parroting of testimony." The motion was denied, the Court stating, that he had no reason to believe that the witnesses in this case would parrot testimony any more than in any other case.

As stated in the opinion of the Court below, Judge Frank indicated an inclination to reverse because of this ruling. The Court, however, held that the ruling complained of was not erroneous on the ground that the exclusion of witnesses is a matter for the sound discretion of the Trial Court.

We respectfully submit that in this particular case the rule of exclusion invoked by the defendant should have been granted. Wigmore advocates the rule of exclusion as a right, 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955).

The circumstances surrounding this case were such that sound discretion dictated that witnesses awaiting calls should be excluded. Over three and a half years had expired between the last act of alleged conspiracy and the trial. More than four and a half years had elapsed between the first act of the alleged conspiracy and the trial. It was apparent from the nature of the indictment which comprehended matters occurring over such a long span of time that witnesses could not remain uninfluenced if they heard testimony of other witnesses of events which transpired years ago. Eight government witnesses and a lawyer testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. It was quite apparent that the anticipated parroting had occurred.

The testimony concerned conversations and admissions and involved shades of meaning, innuendo and extremely illusory evidence of an emotional nature. Witnesses recited their fears when they heard of the money demand in almost similar fashion as though they were fulfilling a necessary ritualistic incantation of the requirements to secure a conviction.

We submit that if, as the Court of Appeals below held, exclusion of witnesses in a case such as this is a matter for the sound discretion of the Trial Court, and not a matter of right, discretion was abused in this case.

In further support for the application of the discretionary rule of exclusion, the Court below reinforced its views by reference to the incident involving a news story

relating to a threatened government witness, implying that exclusion of witnesses might have subjected them to threats from the defendants. The record in this case contains no evidence that the defendants or any one connected with them made any attempt to approach any of the witnesses or to influence them.

The decision of the Court of Appeals implying that a denial of the motion to exclude witnesses is properly based upon the belief that witnesses will be protected thereby and justice better served is hardly compatible with the necessity of affording a fair trial to the defendants.

POINT VI

Since the indictment herein charges the crime of conspiracy to commit a violation of Section 1951 Title 18, United States Code commonly known as the Hobbs Act, should the petition of Joseph P. McConnon be granted, the defendant Postma would have been convicted in a conspiracy of one: Therefore, your petitioner respectfully requests that in the event the petition of Joseph McConnon is granted, the petition of Peter Postma be also granted.

POINT VII

Your petitioner feels that a review is urgently required in the action now before this Court, particularly in view of the untimely death of Judge Frank. It is apparent from the notes contained in the opinion of this Court that Judge Frank had convictions contrary to the other two judges of the Court concerning both of the problems discussed in this petition. Apparently, in preliminary conference he indicated his feelings to the other members

of the Court. We feel that the petitioner is entitled not only to the individual opinions of each of the members of the Court but, more particularly, to the wisdom of the Court as a whole arrived at after fruitful discussion and interplay of ideas.

For the above reason your petitioner feels that a review is necessary.

And the petitioner will ever pray.

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QUESTIONS PRESENTED

1. Whether a business man affected by a strike could properly be found guilty of conspiracy with a union official to violate the Hobbs Act by reason of his participation in extorting personal tribute as a condition of settling a strike.

2. Whether there was a fatal variance between the conspiracy charged in the indictment and the proof.

3. Whether the trial court committed reversible error in denying a motion to exclude from the courtroom witnesses waiting to testify.

4. Whether the court's use of a scales-of-justice metaphor in its charge had the effect of incorrectly stating the doctrine of reasonable doubt.

5. Whether the Hobbs Act is unconstitutionally vague.

STATUTE INVOLVED

18 U. S. C. 1951 provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened

force, violence, or fear, or under color of official right.

STATEMENT

A one-count indictment in the United States District Court for the Northern District of New York charged that, from June, 1951, and continuing up to the date of the indictment, petitioners Postma and McConnon, one Robilotto, and others, conspired to interfere with interstate commerce in violation of 18 U. S. C. 1951 by extorting money from eleven named truckers under threat of continued employee work stoppages (R. 3–4). After trial by jury, petitioners were found guilty[1] (R. 771). Petitioner Postma was sentenced to serve a term of four years, and petitioner McConnon, a term of eighteen months (R. 777, 778). The Court of Appeals affirmed, although Judge Frank, who died before the opinion was filed, had in conference indicated disagreement on some issues (McConnon Pet. 35).

The evidence produced at the trial established the following facts:

Petitioner Postma was at the time of the alleged conspiracy a business agent and vice-president of Local 294 of the Teamsters Union in Albany (R. 22). Truckers in the area testified that Postma, concluding a wage bargaining session with their association in 1951, threatened, "Next year when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are out in the street, I

[1] Robilotto was granted a judgment of acquittal during trial on the ground that there was insufficient evidence against him (R. 501–514).

will jam it down your throat" (R. 58). The following year, Postma, negotiating for the union, demanded a then unprecedented increase of a dollar an hour—forty-four cents on wages, together with pension fund and other fringe benefits (R. 60–63). Counter-offers by the truckers were rejected (R. 63–66). At a meeting on November 7, 1952, the truckers offered ten cents an hour in a five-point offer, each point being one of the categories in a seven-point package deal demanded by the union (R. 68–69). Postma unexpectedly stalked angrily out of the meeting indicating that negotiations might as well start from the beginning, and that the truckers would find out the meaning of his act (R. 69, 208–209, 265–266). That evening a strike began (R. 69, 209).

Petitioner McConnon was head of Trailerships, Inc., a concern which carried truckers' trailers by boat from Albany down the Hudson River to New York (R. 24, 588). On November 13, 1952, McConnon approached one of the truckers, John Vogel, Jr., who with another trucker was at a grill in a hotel which had become strike headquarters for the truckers (R. 72). McConnon asked, "When are you going to get the strike over with?" Vogel answered that the truckers did not know. McConnon left, then came back and asked Vogel to go with him out into the hallway. Once in the hallway, McConnon said to Vogel, "If you will offer the seven points and ten thousand dollars, that Pete [Postma] will settle the strike" (R. 73). Vogel testified that hearing this from McConnon frightened him—that he thought of other truckers who had

signed "if and when" contracts[2] and the ruinous result to his business if he were forced to do so (R. 79). Vogel returned to the restaurant table and told his companion of the offer tendered by McConnon (R. 83). The two men discussed the situation (R. 221) and then drew up a list of truckers and the amounts which each might contribute toward raising the ten thousand dollar amount (R. 86–89). They then went up to the room where the truckers had set up headquarters and discussed the offer with the operators present, who in order "to get the strike over" were willing to go along with the plan (R. 91). Shortly thereafter Vogel went downstairs and told McConnon that the truckers would pay the ten thousand dollars (R. 91–92).

On the following day, McConnon called Vogel at strike headquarters and asked that he meet him in the lobby of the hotel. There he told Vogel that "Nick [Robilotto] had put his oar in" and "they wanted thirty thousand dollars instead of ten" (R. 92). Vogel went upstairs to headquarters, told the truckers of the new demanded sum and received their assurance that they were "not going to go for it" (R. 94). This he told

[2] An "if-and-when" contract is signed by a trucker who, in return for his individual immunity from the strike, agrees with the union that he will be liable for all the obligations under the collective bargaining agreement if and when it should be finally arrived at (R. 210–211). If all the truckers sign such contracts, they have in effect agreed to the original proposal of the union negotiators (R. 188, 211). On the other hand, to hold out against such a contract subjects a trucker to ruinous competitive pressure from other truckers who have signed (R. 211).

McConnon in the lobby. McConnon said he "would go back and tell them" (R. 95). The next afternoon, McConnon again called Vogel and asked that he meet him in the hallway of the hotel (R. 95–96). There McConnon stated that "Pete and they" would take the ten thousand dollars, that for the final negotiations, they wanted a small committee and a separate room and that they did not want the truckers' chief spokesman, a former judge, present (R. 96).

That afternoon Postma with two union representatives and Vogel with two truckers met and for two and a half hours talked only of other matters (R. 100). Then Vogel walked over to one side of the room with Postma where Postma said to him "This town is very small and these operators will talk. * * * Well, they are all getting theirs. I am going to get mine" (R. 102). Thereafter, the two men rejoined the group (R. 102) and Vogel asked if the seven points were acceptable (R. 101).[3] Postma said "Yes" and that he would call a meeting of the union for the following morning (R. 101). On this note, after approximately two minutes of negotiation, the meeting ended (R. 102). The trucks started operating the following night (R. 102).

Vogel collected various sums of money from various truckers (R. 104–106). Two days after the end of the strike, he paid McConnon seventy-five hundred dollars in cash (R. 106). McConnon was given a list of the truckers who had contributed to the sum after he stated that "Pete" [Postma] wanted one (R. 106-

[3] The seven points as accepted included the ten cent wage increase offered by the truckers.

107). The next day McConnon returned with a five-hundred dollar bill and said that "Pete" wanted smaller bills (R. 108). Vogel could not break it and suggested that McConnon try a bank (R. 109). A week later, Vogel gave McConnon the remaining twenty-five hundred dollars in cash together with a final list of the contributors (R. 110–112). McConnon told Vogel that he had paid both sums to Postma (R. 112, 114).

Postma and his witnesses testified generally as to the legitimate character of the strike vote and negotiations (R. 522–678). Postma denied that he conspired to extort (R. 625, 653) or that he ever received any money from McConnon (R. 652). McConnon offered no evidence (R. 679).

ARGUMENT

1. Petitioners contend (McConnon Pet. 21; Postma Pet. 21), as they did below, that the evidence is insufficient to show a conspiracy to violate the Hobbs Act (*supra,* p. 2). They argue that McConnon was a victim of the strike, and that an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. They argue that McConnon's status was like that of his customers, the truck operators, pointing out that as his business was likewise interrupted by the strike, he was motivated by the same economic pressures to get the trucks rolling. This argument misconstrues the nature of the offense which petitioners conspired to commit. It is immaterial that McConnon may have been affected by the strike, for it was not the strike, legal in itself,

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that constituted the criminal act prohibited by the statute. It was extortion, the use of the power to call and end strikes for personal gain, that was the gist of the crime. *Nick* v. *United States,* 122 F. 2d 660 (C. A. 8), certiorari denied, 314 U. S. 687; *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915. McConnon was obviously not a victim of this conspiracy to extort. He made no contribution to the fund. Whatever his motive, McConnon actively joined in and aided Postma's plan to use his power as a labor leader to get money from the truckers for Postma's personal benefit. He thus had the intent to bring about the acts which violate the Hobbs Act.[4] His participation in the extortion scheme marks him as a conspirator.[5] See *Direct Sales Company* v. *United States,* 319 U. S. 703, 713.

The evidence clearly supports the verdict that petitioners did illegally conspire in violation of the statute. The facts, reviewed above, *supra,* pp. 3–7, show that during the progress of the strike McConnon approached a trucker, and, in a clandestine manner, informed him that Postma would settle the strike on the truckers'

[4] In this regard, the fallacy of petitioner McConnon's argument that the trial court erroneously refused to charge as to his motivation and relationship (Point IV, McConnon Pet. 27) becomes apparent. The court's charge, which instructed that "an individual becomes a member of a conspiracy by his intentional participation in it, or in his conscious, active cooperation in the furtherance of its purpose" (R. 747–748) and which repeatedly pointed out that the guilt of the defendants must be considered separately (R. 758–759, 763, 764), was sufficient.

[5] The question of personal benefit is immaterial. This Court held in *United States* v. *Green,* 350 U. S. 415, 420, that extortion, as defined in the Hobbs Act, in no way depends upon a direct benefit.

terms on the payment of $10,000. They show a second surreptitious approach by McConnon with a message that "they wanted thirty thousand dollars instead of ten." They show that the truckers agreed to pay the ten thousand dollars under fear of economic ruin and that the money which they collected toward the demanded sum was turned over in cash payments to McConnon. This evidence is supported by the circumstances relating to the end of negotiations—the incriminating aside remarks made by Postma to the trucker who had been contacted by McConnon, the attempt to feign the time of negotiation and the actual rapidity with which the truckers' terms, formerly flatly rejected by Postma, were accepted. The fact that the existence or an agreement to exact tribute is inferred does not render the evidence insufficient. Proof of a conspiracy by its very nature must be circumstantial. *Direct Sales Co.* v. *United States, supra,* 319 U. S. at 714. The common purpose and plan of the petitioners is inferred from a "development and a collocation of circumstances." *Glasser* v. *United States,* 315 U. S. 60, 80.

2. Petitioners urge, as they did upon their petition for rehearing, that there is a fatal variance between the proof and the indictment (Pets. 26). However, as the court below pointed out (McConnon Pet. 49), the conspiracy proved fell within the period charged which was "[f]rom on or about June, 1951, and continuing up to and including the date of the filing of this indictment." It is immaterial that, because there was insufficient proof to hold Robilotto, the conspiracy charged was not proved to have existed until McConnon and Postma joined together in their extortion

plan. Only a restricted interpretation of the language of the indictment so that "to cause work stoppages" does not comprehend a continuation of a work stoppage once commenced could justify petitioner's position. The court below properly refused so to read the indictment.

Declarations and activities of Postma in 1951 prior to his collaboration with McConnon were properly admissible to show illegal design and *modus operandi* of which McConnon became aware. See *Heike* v. *United States,* 227 U. S. 131, 145; *United States* v. *Witt,* 215 F. 2d 580 (C. A. 2), certiorari denied *sub nom. Talanker* v. *United States,* 348 U. S. 887; *United States* v. *Compagna,* 146 F. 2d 524, 530 (C. A. 2), certiorari denied, 324 U. S. 867. Nor was the charge of the court with respect to McConnon's later alliance (R. 756) prejudicial in this respect. The evidence showed there was an existing plan and the charge consistently referred to "knowledge of a wrongful scheme or plan" (R. 748), "pursuance of this alleged plan or conspiracy" (R. 756), or "knowledge of the existence of the plan or scheme" (R. 756).

3. Petitioners contend that the trial court erred in denying a motion to exclude from the court room witnesses waiting to testify (McConnon Pet. 33; Postma Pet. 29; R. 19).

The reason for the denial of the motion appears on page 7 of the record where the court, in addressing the jury, said:

> Now one other thing, in this courtroom, as in most of our upstate courthouses, the place is pretty crowded. We don't have any places for jurors, or lawyers, or witnesses, that is, no spe-

> cial place for them. Jurors are thrown in contact with counsel and witnesses, especially out there in the hall.

Faced with this practical necessity, it is understandable that the trial court, in the exercise of its discretion, properly decided to allow the witnesses to remain in the courtroom. This was especially appropriate in the light of the trial court's concern with the news story relating to a threatened government witness (R. 341–355). As the court below pointed out (McConnon Pet. 43; 242 F. 2d 488, at 494, fn. 5), it is well established by a long and unbroken line of federal cases that the exclusion of witnesses is a matter for the sound discretion of the trial court. See also *Holder* v. *United States*, 150 U. S. 91.

Moreover, no prejudice has been shown; the strongest testimony was that of Vogel and no other witness was in a position to testify with respect to the most incriminating parts of Vogel's testimony. Of the succeeding government witnesses, one corroborated Vogel's testimony that he was approached by McConnon at the time of the illegal demand (R. 214); another testified to a later admission by McConnon (R. 489). Three of the truckers who followed Vogel to the stand supplied only testimony as to the varying sums supplied by them and assurances of their fear of economic ruin (R. 355, 377, 397), matters with respect to which there could be no "parroting." True, there was substantial agreement by some of these witnesses as to Postma's threats made in 1951 (R. 201, 261, 307, 407) and as to his conduct in a general way at negotiation sessions (R. 209, 226, 266, 273, 314,

417) but no inference of unreliability can be drawn from this.

4. The court gave full instructions as to the burden of proof, the meaning of reasonable doubt, and the presumption of innocence which, it stated, "exists unless and until you are satisfied in your review of the evidence that the guilt of either or both defendants have been established beyond a reasonable doubt" (R. 749–750). Continuing in language suggestive of the supplementary nature of his later remarks, he began (R. 750), "* * * following that statement of those two rules [i. e. reasonable doubt and presumption of innocence] I think perhaps it would be *logical* if you would say to me, 'Well, how do I weigh evidence; * * *.'" Thereupon he told the jury that he could give them no magical formula, but that he could call attention to several things which they may consider in determining the weight to be accorded a particular bit of testimony, or to evidence, offered by the witnesses. He noted that weight of evidence was not to be governed by the number of witnesses but by conviction and then gave the scales-of-justice analogy to which no exception was then taken, but which both petitioners now claim was erroneous (McConnon Pet. 31, Postma Pet. 27).

When the language is read in context, in logical sequence, it gives no impression of contradicting or modifying the instruction as to reasonable doubt. Rather, the court's illustrations of the things which the jury might take into consideration in determining the weight of items of evidence suggest that the metaphor was primarily intended as an aid to the jury in deter-

mining credibility. In any event the instruction complained of makes it clear that even if evidence in favor of the Government is "more weighty", it still requires a determination of whether it is of the character to dispel any reasonable doubt, and that if it is evenly balanced or inclined toward the defendants, the Government has not carried the weight of evidence, and *a fortiori* has not established guilt beyond a reasonable doubt.

5. Petitioners allege that the Hobbs Act is unconstitutional for vagueness. They direct part of their attack specifically to the words "fear" and "wrongful", both of which appear in the definition of the term extortion in the Act which is said to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right" (*supra*, p. 2; McConnon Pet. 17–20; Postma Pet. 17–20). There is nothing obscure about this definition as a whole or the simple and well-understood words used therein. Congress has defined extortion in its generally accepted meaning. With respect to this, Congressman Hobbs, the author of the Act said: "They [the terms robbery and extortion] have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11900. See also the remarks of Congressman Robsion at 91 Cong. Rec. 11906.

Petitioners' argument that the word "fear", construed to include fear of economic loss, renders the word so ambiguous as to require a finding of uncon-

stitutionality is but a variation of the arguments consistently rejected by the courts of appeals to the effect that use of economic power for personal enrichment is not an offense under the Act.[6] *United States* v. *Varlack,* 225 F. 2d 665 (C. A. 2); *United States* v. *Masiello,* 235 F. 2d 279 (C. A. 2), certiorari denied, *sub nom. Stickel* v. *United States,* 352 U. S. 882; *Callanan* v. *United States,* 223 F. 2d 171 (C. A. 8), certiorari denied, 350 U. S. 862; *United States* v. *Dale,* 223 F. 2d 181 (C. A. 7); *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915; *Hulahan* v. *United States,* 214 F. 2d 441 (C. A. 8), certiorari denied, 348 U. S. 856. See also *Nick* v. *United States,* 122 F. 2d 660 (C. A. 8), certiorari denied, 314 U. S. 687, and *United States* v. *Compagna,* 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867. Petitioners are aware of this fact, but they advance the theory that the fact that these cases were not noted in *United States* v. *Green,* 350 U. S. 415, suggests that this Court recognized that they have improperly extended the

[6] It should be noted that before the adoption of this definition in the Hobbs Act, the courts of New York, in construing the New York extortion statute, consistently ruled that the use of fear of economic injury to induce another to turn over money or property for the personal use of the one demanding it constituted extortion. *People* v. *Wilzig,* 4 N. Y. Crim. 403 (1886); *People* v. *Barondess,* 133 N. Y. 649 (1892); *People* v. *Hughes,* 137 N. Y. 29 (1893); *People* v. *Weinseimer,* 117 App. Div. 603 (1907), affirmed, 190 N. Y. 537 (1907); *People* v. *Warden of City Prison,* 145 App. Div. 861 (1911), affirmed, 206 N. Y. 632 (1912); *People* v. *Rosenzweig,* 265 N. Y. 323 (1934); *People* v. *Lamm,* 292 N. Y. 224 (1944); and *People* v. *Bernoff,* 292 N. Y. 230 (1944). The Hobbs Act, which adopted the New York definition, is construed the same way.

ambit of the Hobbs Act. The obvious answer is that because the issue of extortion induced by fear of economic loss was not before this Court in the *Green* case, no such inference can be drawn.

There is likewise no merit to petitioners' contention that the failure of Congress to define the word "wrongful" is fatal. "Wrongful" was defined in the predecessor statute, the Anti-Racketeering Act of 1934, as the violation of the criminal laws of the United States or of any State or Territory.[7] No significance can be attached to the omission of the definition in the amended act, the prime purpose of which was to overcome the decision in *United States* v. *Local 807*, 315 U. S. 521. (See *United States* v. *Green*, *supra*, at p. 419.) Since legitimate labor activity may involve to some degree the use of fear, the use of the word "wrongful" was manifestly designed to limit the statute to situations where either the end or the means cannot be legally justified. See *Bianchi* v. *United States*, *supra*, 219 F. 2d at 189–190.

Petitioners' additional argument (McConnon Pet. 14, Postma Pet. 14) as to the vagueness of the term "affects commerce" has no application to this case since here the conspiracy was directed toward persons actually engaged in the transportation of goods in interstate commerce. The statute covers activities designed to "obstruct" and "delay" commerce as to which there can be no issue of vagueness. The very

[7] The question raised by Judge Biggs, in his dissenting opinion in *United States* v. *Kemble*, 198 F. 2d 889, 902 (C. A. 3), certiorari denied, 344 U. S. 893, as to whether the word "wrongful" likewise includes a private wrong is not germane here.

aim of the legislation is the protection of interstate commerce against injury from extortion. *United States* v. *Green, supra,* 350 U. S. at 420.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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